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Public Participation in Energy Related Decision Making Workshop Proceedings. Edited Transcripts from Workshop Held in McLean, Virginia on September 21 and 22, 1976

MITRE Corp., McLean, Virginia. METREX Div.

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Public Participation in Energy Related Decision Making: Workshop Proceedings

Sponsored By

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METREK, A DIVISION OF THE MITRE CORPORATION
AND
THE NATIONAL ACADEMY OF PUBLIC ADMINISTRATION
SEPTEMBER 21 AND 22, 1976

Sponsored By

DIVISION OF POLICY RESEARCH & ANALYSIS
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ABSTRACT

This document contains edited transcripts of presentations and discussion at plenary sessions of a workshop on Public Participation in Energy Related Decision Making sponsored by the National Science Foundation and held at The MITRE Corporation in McLean, Virginia on September 21 and 22, 1976. The Emergency Core Cooling System rulemaking, the consideration of Energy Parks in Pennsylvania and the Seabrook, New Hampshire Nuclear Station decisions are summarized, and the process of public participation in each decision is analyzed by actual participants in the respective cases. Also summarized are the North Anna decision, the Sears Island decision and the Big Rock Point decision. The conclusions and recommendations from working group discussions on the role and process of public participation are presented. An overall summary is provided, along with the final report of the National Academy of Public Administration Panel which was convened to assist in the design and conduct of the workshop. A companion volume to these proceedings, Public Participation in Energy Related Decision Making: Six Case Studies, M76-53, was distributed to participants prior to the workshop and includes complete case studies of the above six decisions.

FOREWORD

On September 21 and 22, 1976, a workshop on Public Participation in Energy Related Decision Making was held at The MITRE Corporation Conference Center in McLean, Virginia. This workshop was part of a program of technical and administrative support being provided to the National Science Foundation Division of Policy Research and Analysis by METREK, a Division of The MITRE Corporation. An Advisory Panel convened by the National Academy of Public Administration (NAPA) provided guidance to METREK in the design and conduct of this workshop.

The purpose of the workshop was to provide the opportunity for participants to discuss the process of public participation in energy related decision making--its advantages, its drawbacks, and ways in which the process can be improved. The participants included a balanced and representative collection of approximately 100 individuals involved in energy related decision making as citizen intervenors, industry applicants, government policy makers and academic observers. Six case studies of energy related decisions were distributed to participants in advance and served as the focus for the workshop. These studies are contained in the volume, Public Participation in Energy Related Decision Making: Six Case Studies, M76-53, published by the MITRE Corporation.

This volume contains the proceedings of this workshop. These proceedings are based on a verbatim transcript of the presentations and discussions at plenary workshop sessions. Speakers were given the opportunity to perform a first cut at editing their transcribed presentations. METREK has exercised heavy editorial license in preparing the discussion and comments for publication. In addition to those changes required to make the spoken word more readable, administrative announcements and those comments not specifically directed toward issues of public participation have been omitted.

Included with the workshop proceedings in this volume are an executive summary which highlights and analyzes the major points raised in the workshop, a report on public participation issued by the NAPA Advisory Panel subsequent to the workshop and a list of participants and observers at the workshop.

The editorial work was performed by Beth Borko. The editor wishes to acknowledge the support and assistance of Marvin Kahn as well as the cooperation and patience of METREK's W-50 Word Processing Center in the lengthy compilation of this document. All editorial changes and interpretations are the sole responsibility of The MITRE Corporation.

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EXECUTIVE SUMMARY:
WORKSHOP OVERVIEW, HIGHLIGHTS AND CONCLUSIONS, AND COMMENTARY

Overview

Introduction

In response to widespread dissatisfaction with existing processes for making energy related decisions and in recognition of the controversy surrounding the role and effect of public participation in these processes, on September 21 and 22, 1976, METREK, a Division of The MITRE Corporation, conducted a workshop entitled Public Participation in Energy Related Decision Making. METREK was assisted in this effort by an advisory panel of the National Academy of Public Administration (NAPA). The workshop was sponsored by the National Science Foundation Division of Policy Research and Analysis.

The purpose of the workshop was to assess the role of public participation in energy related decision making by identifying the benefits and problems of public involvement in decision making processes. Approximately one hundred persons participated in the two day workshop, including actors in previous energy related decisions and others representing public interest groups at national and local levels, energy industry and trade organizations, government policy makers and regulators at federal, state and local levels, attorneys engaged by these various groups and academic observers.

The advisory panel from NAPA was convened to advise METREK concerning workshop design and to provide specific workshop background materials. The panel provided case studies which served as the focus for the workshop, and following the workshop issued a report on public participation in energy related decision making.*

Workshop Planning and Background

In designing the workshop, METREK and the NAPA panel identified the case study approach as the most effective method of surfacing issues of both policy and procedure. Six energy related decisions in which citizens had played an active role were selected for study, and papers examining these cases were provided by the NAPA panel for publication by METREK and distribution to participants prior to the workshop. The case studies were performed to explore the role and process of public participation, rather than the technical issues, in each case. The major factors affecting the selection of cases for study included both the extent of the role of the public in the decision and the practical availability of a study of the decision within the prescribed time and budget. Four of the six decisions selected concern energy facility siting and four concern nuclear-related decisions of some sort. This does not reflect a conscious emphasis by workshop planners, but rather reflects those types of energy related decisions in which public involvement to date has been greatest.

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*The case studies are contained in the volume Public Participation in Energy Related Decision Making: Six Case Studies, M76-53, published by The MITRE Corporation. The panel report was issued by NAPA, and is also reproduced in Appendix B of the workshop proceedings.

The six case studies included the following:

- *Experiment in Rulemaking: The Debate Over Emergency Core Cooling Systems*, the two-year rulemaking proceeding and subsequent decision by the Atomic Energy Commission on the standards for emergency core cooling systems in nuclear reactors;
- *The Energy Park Experience in Pennsylvania*, the study and subsequent suspension of consideration by a group of Pennsylvania utilities in cooperation with the Governor's Energy Council of the possibility of locating up to 26,000 MW of nuclear and coal-fired electric generating capacity at one large site within the state;
- *A Case Study of Seabrook Nuclear Station*, the licensing proceedings for a nuclear reactor in Seabrook, New Hampshire, located near to the state's limited coastal area;
- *Test at Sears Island*, the denial of siting permits for an offshore refinery in Searsport, Maine;
- *Big Rock Point*, the challenge by citizens' groups in Michigan of the experimental usage of plutonium in the Big Rock Point reactor, resulting in a generic rulemaking on the procedure;
- *North Anna*, the challenge by a small citizens' group in Virginia that resulted in the finding that the Virginia Electric & Power Company had withheld information from the AEC/NRC concerning the existence of a geological fault at its North Anna nuclear site.

Workshop Format

The body of the workshop consisted of in depth presentations on three of the six case studies. In each of these cases the decision was summarized and discussed by a panel of original participants representing the various parties involved (i.e., intervenors, state and Federal regulators, utilities, etc). Each panel was followed by an open question and answer session. Working groups were formed to discuss the issues raised and to report on whatever conclusions or recommendations resulted. In addition, keynote and luncheon speeches were presented on the relationship between regulation and the public interest and on the process of public participation in various types of Federal agency decision making.

Highlights and Conclusions

Throughout the workshop the discussion continued to return to a relatively small number of issues. This section will highlight these issues and summarize salient points from the discussion.* It will not try to summarize the proceedings nor will it try to provide a comprehensive analysis of the issues of public participation. A more comprehensive discussion of public participation can be found in the NAPA panel report which is reproduced in Appendix B. The major issues raised at the workshop are highlighted in Table 1.

The Public Interest and "Public Interest" Groups

The workshop participants, intervenors and applicants alike, have, for the most part, advanced beyond the all too familiar argument of whether so-called public interest groups do or do not represent the views of the general public. It was accepted early on that the so-called public interest groups speak for certain special interests among the general public, and are not necessarily representative of the general public view.

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*This summary has been prepared by METREK, a Division of The MITRE Corporation; the comments and conclusions reflect METREK's interpretation of the workshop proceedings, and METREK is solely responsible for the content.

TABLE 1

MAJOR ISSUES FROM WORKSHOP ON PUBLIC PARTICIPATION IN ENERGY RELATED DECISION MAKING

The Role of Public Interest Groups

- It is widely accepted that special interest groups do not represent the general public; however it can be argued that their input to energy related decision making is in the public interest.

- The provision of funding for intervenors is a subject of contention:

    - PRO - Better representation of all points of view is in the public interest; funding is only fair since other parties have ample resources.

    - CON - Public funding for special interest groups is suspect: the selection of eligible groups is difficult.

Decision Making Procedures

- Many energy related decision making procedures are unduly complex and time consuming.

- The adjudicatory process for reaching energy related decisions is a subject of contention.

    - PRO - It assures thorough consideration of all points of view.

    - CON - It is lengthy and time consuming and inappropriate for judgmental decisions.

- The presentation of intervenors' cases through cross-examination rather than affirmative testimony is a major factor in the tediousness of many energy related decision making proceedings.

- In many site specific decision proceedings intervenors raise issues not germane to the decision being made but for which there is no other available forum.

TABLE 1 (continued)

MAJOR ISSUES FROM WORKSHOP ON
PUBLIC PARTICIPATION IN ENERGY RELATED
DECISION MAKING

- Public access to decision making processes is often provided at too late a stage for that participation to be effective.

National

- There is a need for a national re-evaluation of nuclear issues in the context of environmental tradeoffs and an overall energy strategy.

- The consolidation of multiple agency considerations of the same aspects of a specific project would help simplify the energy facility siting process.

- The country is experiencing a lack of trust in governmental institutions and decision making processes which is strongly reflected in energy related decision making.

Given this general agreement, there remained some disagreement on the proper role of such groups in energy related decision making procedures. There was little dispute that the goal of decision making by public agencies should be to arrive at a fair and sound decision based on a thorough consideration of all points of view. A pivotal concept that was presented suggests that if all points of view are clearly and thoroughly presented to decision makers, better decisions should result than when they are not presented well or at all. Certainly it is in the public interest to have a decision making process which assures expeditious and equitable decisions. One possible conclusion, then, is that although intervening groups do not represent the overall public, it is nonetheless *in the public interest* for these special points of view to be presented to and considered by decision makers.

Even those who accepted this conclusion had varying opinions concerning how the presentation of these views is best accomplished and the extent to which their expression should be assured by governmental action.

Decision Making Procedures

The impact which the public can have on a decision is determined to a great extent by the particular procedure used to reach the decision. There was some disagreement concerning the effectiveness of different types of administrative procedures for making energy related decisions. The adjudicatory process had both its staunch advocates and harsh critics. Some critics expressed the view that a legislative format is more appropriate for decisions which are fundamentally judgmental; others complained that adjudicatory proceedings are often drawn-out and time consuming and that the role of attorneys in these decisions is inordinately large. Proponents of the adjudicatory process argued that while it is often time consuming, it provides the best opportunity for a full and thorough exploration of all sides of a case; the legislative format, it was argued, provides no opportunity for presentation of the assumptions or demonstration of the credibility of any witness.

Whatever the specific process being examined, one complaint became clear: nearly all the procedures are felt to be unduly complex. There was strong agreement that numerous improvements can be made within the existing processes. Suggestions include the practice of pre-trial identification of those issues on which there is dispute and subsequent limitation of hearing discussion to those issues, and consolidation of issues and of positions among intervening parties to streamline presentations.

All agreed that a major factor contributing to the length and tediousness of many adjudicatory proceedings was the time consumed by intervenors in cross-examination of the expert witnesses of the other parties. While some noted this as evidence of the weakness of the adjudicatory process, others argued that it was the result of the low level of resources available to intervenors. Lacking the funds to provide their own expert witnesses, it was argued, the intervenors are simply unable to present strong affirmative cases and must instead try to utilize the expertise of the witnesses provided by opposing parties. This process is tedious and often not very effective.

Funding for Intervenors

The issue of funding for intervenors was raised repeatedly throughout presentations and discussions; indeed it seemed foremost in the minds of many of the participants. Those in favor of funding argued that while the rate base supports the applicant's costs of representation, and public funds support the agency's participation, no funding source is available to allow intervenors to present a competitive case. If better decisions are in the public interest, it was argued, then the costs of adequate presentation of significant viewpoints could justifiably be paid by the taxpayers. Further, proponents argued that better funded representation would allow affirmative cases to be made; this would help eliminate lengthy cross-examination and thus would lead to more effective proceedings.

Opponents argued that since most citizens' groups represent special interests and not the general public, public funding is inappropriate. Further, if such groups were to be publicly funded, there was skepticism concerning mechanisms for selecting those groups which ought to receive funds, and concern over possible abuses.

In the event that funding of intervenors was deemed desirable, however, it was felt that a careful effort must be devoted to developing the mechanisms and procedures for such funding--to determine the source of funds, the criteria for group eligibility, and the actual procedures for group selection.

The Spirit and Timing of Public Access

An important area of concern was identified as the spirit with which the public is invited into current energy related decision making processes. Participants complained that all too often public input is solicited in fulfillment of regulatory or legislative requirements or in response to social pressures, but not with any genuine concern for the public points of view. The result is not public participation in the planning process, but simply public presence. Further, this access is frequently offered only after the completion of industry planning and preliminary approvals by regulatory agency staff. At this point the public is simply made aware of an already made decision; it is often too late for the inclusion of public points of view in the ultimate decision making. The serious involvement of affected and interested public groups early in the planning or policy analysis process would signify respect for and seriousness about public participation, would enable that participation to be more effective, and would remove one of the major causes of eleventh hour delays which occur now as public groups are given their first access to the decision process*.

Earlier public access to the decision process would also allow the many issues to be addressed in an orderly and thorough way. A frequent complaint about public participation in energy related decisions is that questions which are not properly part of the formal decision being made are raised in the proceedings by intervening groups. Two examples are the arguments over the need for power and over the wisdom of a nuclear strategy. While there are no doubt instances where intervenors have raised such issues simply as a delaying tactic, the frequency of their introduction strongly implies some larger problems with public participation in energy related decision making at both the site specific and the national policy levels.

The Need for an Orderly Process

In the case of site specific decisions, the issue of the need for power is usually debated and settled prior to plant licensing. The case is often made before the state public utility commission and/or other agencies at different jurisdictional levels. A mechanism for assuring public awareness of and participation in this process would allow this decision to be made and accepted at an appropriate early time. Such a mechanism cannot be developed, however, without a careful examination of the planning functions of utilities, states and the Federal Government.

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*See the NAPA panel report for an extensive discussion of the pros and cons of early public access to energy facility siting decisions.

A related concern is the fact that frequently, many issues must be presented by applicants for approval by several different agencies at different jurisdictional levels. The consolidation of decisions on such issues would go a long way toward streamlining, not just the individual licensing decision where the need for power issue would already have been debated and decided, but also the overall siting obstacle course in which utilities must argue the same issues before several different agencies. Of course, major legislative action would be required to restructure these processes.

The Nuclear Debate

It seems clear that where the debate concerning a nuclear and non-nuclear strategy is interjected into site specific licensing proceedings, this reflects public frustration with a current national policy. While the commitment to the development of nuclear energy was made over 20 years ago, no comprehensive legislative reexamination has been made of the nuclear issues, particularly in the context of the country's changing awareness of environmental concerns and in the context of an overall post-embargo energy strategy. The individual nuclear plant licensing hearing is not the appropriate arena for such a re-evaluation, but it is frequently the most accessible forum.

Individual state initiatives attest to growing awareness of the need for a comprehensive public look to reassess the nuclear policy. The allocation of the costs and benefits of meeting the country's energy needs is an especially difficult problem; a national approach which balances states' sovereignties and responsibilities is desperately needed. Current studies by the Ford Foundation and the National Academy of Sciences are attempting comprehensive examinations of energy alternatives. Following their release, a full legislative consideration with substantial public input would provide the appropriate forum for the nuclear debate.

Distrust of Institutions

One underlying concern to many workshop participants was the lack of trust in governmental institutions and decision making processes expressed by many members of the public. This distrust pervaded many of the decision making proceedings examined in the case studies. It also characterized the attitude of many of the participating intervenors toward the utility and regulatory representatives present at the workshop. This lack of trust in governmental institutions and decision making processes is likely to continue to be a problem until communications among the various parties are improved and until there is developed a substantive record providing evidence of responsible and equitable decision making.

Commentary

As METREK and the NAPA panel realized early in their planning, a key factor in the success and value of the workshop would be the experience of the persons attending; participation by persons having varied experience and well articulated ideas on energy related decision making procedures, and constituting a balanced representation of all points of view, was crucial. Those attending included individuals who had been involved in one or more of the case study decisions as decision makers or public participants or industry applicants, along with numerous representatives of national groups and government agencies which frequently participate in similar deliberations. A major accomplishment of the workshop was achieved in simply bringing together these diverse elements and providing the opportunity for constructive and concrete interaction.

As the workshop planners had hoped, workshop participants did not re-argue the points of specific cases but rather took the difficult but crucial step of trying to identify and suggest resolutions of underlying issues. While no major breakthroughs which will redirect the future of public participation resulted, the actual accomplishments are real and important. Most of the participants, whose normal interactions are often marked by rancor and frustration, spoke with, not simply to, one another; the discussions were able to go beyond soap box presentations of traditional positions by familiar spokespersons. Participants learned about each other's attitudes, not simply their positions. An important example is the statement by one participant--an attorney representing a utility in a siting the intervenors distrusted the decision making process and the other parties in these cases.

Because of the scope of issues addressed in the discussions, the workshop constituted only a beginning, an establishing of grounds for constructive noncombative communication among players with different perspectives on the same issues. It showed that this can be done. Numerous issues were identified which require further discussion and resolution. It might be valuable in the future to build on this foundation, to bring together some of these same people with an agenda of a few very specific questions to be examined at length.

WORKSHOP
PROCEEDINGS
TUESDAY SEPTEMBER 21

WELCOME

HERBERT BENINGTON
THE MITRE CORPORATION

Good morning. I am Herbert Benington, general manager of MITRE's Washington operations. I want to welcome you all to this exciting and terribly important meeting. MITRE has diversified a good deal in the dozen years that it has been in Washington but this is without a doubt the most diversified audience that we have had I hope that leads to a constructive meeting.

This is the seventh in a series of eight workshops that we have held over the past two years for the National Science Foundation Division of Policy Research and Analysis. All of the workshops have been in the general area of energy and have related to questions such as electric utilities, power plant siting, and the like. This is certainly one of the more ambitious in scope. It has been developed with the assistance of an advisory panel convened by the National Academy of Public Administration. James Sundquist, who is a senior fellow of the Brookings Institution, was the chairman of that panel.

As I have indicated, MITRE has diversified over the last several years. We started out strictly in the information sciences business, specializing in the use of computers to assist first military and then transportation functions. About five years ago,

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it became clear that infrastructure questions such as energy and the environment would become important to those other activities, and we developed an active program in these areas.

A unique aspect of those two fields is the very large role that the public plays in the decision making process; while in some of our other fields we were used to a more closed and deliberate and comprehensive decision making, we now find that public involvement seems more episodic, less regularized and often polarized. That is not bad at all. As a member of the Board of Education of Montgomery County, I have gained great respect for the political process and the essential energy that it provides to our society. If today and tomorrow you can develop better perspectives on how to make that a more constructive part of the development of answers to our energy and environmental questions, then you will make significant progress.

INTRODUCTION

JOEL A. SNOW
NATIONAL SCIENCE FOUNDATION

It is a pleasure to be here today at the beginning of what may prove to be a unique experiment in improving the public process related to energy decisions.

I would like to make a few remarks to indicate the aspirations that the National Science Foundation has for this meeting. The meeting was designed as one of a series of NSF projects related to energy facility siting issues. It was initiated as part of the effort supporting the Science Advisor to the President, who, until recently, was also the Director of NSF.

As you would expect, the problems and issues associated with the location of energy facilities became a very critical matter to the Science Advisor to the President at the time of the energy crisis and subsequently. During the past three years while Dr. Stever has been Science Advisor, the Arab oil embargo and related events have taken place and we have paid a great deal of attention to energy siting questions and to the identification of ways in which the public process associated with these matters can be improved.

We appreciate very much the efforts of the National Academy of Public Administration and MITRE in getting this meeting underway. We appreciate very much the involvement, attendance, participation, and constructive efforts of everyone who is here today.

It has been clear for some time that the location of energy facilities involves a complex set of conflicting responsibilities, authorities and views; and the voice of the public, outside and within the formal processes of government, plays an exceedingly important role. It is further clear that our processes for achieving a meaningful dialogue and a reasonable consensus on such matters is just not as effective as might be, often leaving all parties frustrated and dissatisfied. As the case studies for this conference indicate--and I have read them and found them fascinating--these experiences often lead to strong polarization of views as participants try to address a confusing mixture of scientific, technical, legal and political issues.

Our overall goal for this workshop is to see if, by studying the number of such cases in a professional working environment, we can find ways of improving this important public process. We felt it essential that this task be undertaken, not solely by a group of outside scholars or administrative and legal experts, but by people who themselves had been participants in the process and had personal knowledge of how these things take place.

I think it is important to recognize that considerable progress has been made in recent years toward incorporating the views of citizen groups into the decision process governing the various types of high technology energy systems. I can say this with confidence because I have been there myself. I have participated on both the citizen group side, some years ago before I entered the federal government, and also more recently in related federal government activities.

One analysis that some of you may find of interest and may not have seen because it is in a rather obscure place, is a discussion of public acceptance of nuclear power which appears as an appendix to the Nuclear Task Force Volume of the Project Independence Blueprint. During the course of the Project Independence study, I had the responsibility to lead a small team studying the public acceptance problem; and I can assure you that, at least to a degree, the problem and the need for finding a more effective consensus on these matters was taken into account in the Project Independence study. I think there you will find a clear awareness of the need for activities such as this workshop to aid us in reaching our common goal of public service.

It is probably obvious to all of us that the problem of energy facility siting is but one of a host of problems connected with the growth of technology and its use in society. This is a matter of long-term interest to us at the National Science Foundation as we try to understand the interaction of technology in society and the problems involved in accommodating technology in our increasingly complex world. The admixture of scientific and technical questions with social questions and political matters poses difficult challenges for us all, as we seek to arrive at an end point that will serve the people of this nation well. We believe it clear that we must experiment with ways to improve our attack on such problems. In that sense, we view this workshop as an experiment.

A parallel experiment, that of establishing the so-called "science court" to resolve technical disputes associated with public policy issues, has been widely discussed in connection with the Science Advisor's activities, and, in fact, a sizeable and extensive workshop on the "science court" question is taking place this week.

I am quite confident that the need and necessity of public involvement in socio-technical issues is widely recognized now and that initiatives such as the recently enacted "sunshine" legislation will go far to improve public confidence in the process of government. It is surely evident that just as the technology and the society it serves are ever changing, the social institutions which control the use of technology must change and must evolve to improve our collective ability to make wise and equitable judgments. That is the major goal of our efforts in policy research and analysis at NSF. That is really what this meeting is about.

BIOGRAPHY OF SPEAKER

JOEL A. SNOW is a recipient of many awards for his government service, has written some 70 published articles, and has a long list of professional interests ranging from the microscopic to the macroscopic. He attended the University of North Carolina and received his doctorate from Washington University. He is now Director of the Division of Policy Research and Analysis of the National Science Foundation, after a career in U.S. Navy nuclear programs.

KEYNOTE
PRESENTATION

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REGULATORY REFORM AND THE PUBLIC INTEREST

RICHARD L. DUNHAM, CHAIRMAN
FEDERAL POWER COMMISSION

It is a pleasure for me to be with you this morning to participate in this conference. As Dr. Snow pointed out, in some respects and in some aspects of the energy crisis, the Federal Power Commission has managed to be on the front line of controversy. I sometimes think that our job in deciding many of the issues is essentially one of trying to distribute dissatisfaction equally. There is very little chance that any of our decisions, at least in the year that I have been there, can achieve the goal of satisfying anybody, to say nothing about trying to satisfy everybody.

During the past summer the respected economist Murray Weidenbaum, who has served as an Assistant Treasury Secretary for Economic Policy and now is a professor of economics at Washington University in St. Louis, was interviewed by U.S. News and World Report on the subject of regulation. Professor Weidenbaum placed the price tag of regulation to consumers at literally billions of dollars each year, as a result of higher costs of production and reduced competition in many industries. That calculation, with which I agree, brings up two important questions I think we all need to face when it comes to the subject of regulation.

At what point does regulation become over-regulation, ceasing to fulfill its basic aims of protecting the public interest, and what

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can be done to change and improve the present system of regulation? The continued and increased participation of the general public and public interest groups in the regulatory decision making process can result in significant improvement of that process if, and I would emphasize that this is a very important "if," public participation and action is constructive, and contributes to the overall public interest, and does not unnecessarily delay decisions.

The overriding public need is for regulation which solves the problems inherent in managing such broadly-based industries as communications, transportation and the subject of this conference--energy--and solves them quickly enough to meet the common needs of the public. The last thing any of us needs, whether we are regulators, businessmen, or private citizens, is a further lengthening of the delays which have become a part of the regulatory process, especially when those delays do not contribute to solutions.

As it is currently constituted, much of Federal, state and local regulatory activity is calculated to make no one happy. Increased public participation of a more general nature, the subject of your conference today, is a new element in the more traditional role of consumers in regulated industries. Historically, at least in the field with which the Federal Power Commission deals, the primary focus of consumer participation has related solely to rates and changes in rates, or methods of distributing costs among various classes of ratepayers.

Consumer representatives, in their broadest sense, feel that regulatory agencies do not now take into account interests other than solely the cost element of increases or changes in rates, and that we serve primarily interests of giant corporations. Regulated industries, on the other hand, feel that the process of Federal, state and local regulation hampers their growth, and their ability to meet the needs both of their customers and of their stockholders. The system of judicial review of the regulatory process and all the elements of it, it seems to me, often demonstrates a tendency to thwart the intent to regulate actions by seemingly endless judicial review. But all of this has led to an increasingly popular cry for regulatory reform. Indeed, the call for reform of any established element of government is a traditional rallying cry in any election year and 1976 is no exception.

Unfortunately, the rhetoric which has transpired so far, and which seems likely to continue, tends to divide those concerned with regulation into two polarized camps: those who favor current regulation and those who would abolish the regulatory processes as they now stand.

I feel that neither of these opposing views is entirely correct. But somehow we seem to have lost sight of the basic purpose of the regulation, to protect the interests of all concerned, so that the public service can be performed. This is, or should be, the real goal and role of regulation. Where regulation fulfills its purpose of balancing the interests of the public and of industry, it has a valid function and a fully justifiable reason for existence and it should be continued. But where regulation fails to meet those requirements, either generally or because it has gradually lost its original effectiveness, it must be re-examined. It is through this process of re-examination that we can accurately determine whether existing processes are wrong, right, or potentially useful with modification.

In this Bicentennial Year, it is both interesting and informative to reread the basic document upon which our federal government is founded, the Constitution. Few such treatises in the history of the world have survived as long and as successfully as our Constitution, yet it is virtually silent on the subject of regulation, as we know it today. Regulatory commissions as institutions which combine legislative, judicial and executive functions were never mentioned or contemplated.

The Founding Fathers provided for change, when change became necessary in the machinery of government. Among the changes over the two centuries of our existence as a nation has been the establishment of numerous regulatory agencies, agencies to which the Congress and the states have duly delegated awesome responsibilities and powers to shape the present and future of our economic life. The economic impacts of regulatory decisions can be far-reaching and often those impacts affect every citizen, either directly or indirectly.

When the Federal Power Commission issued its opinion establishing new national producer rates for natural gas in July, we noted that the cost impact on consumers during the first year of the effect of new prices would be in the neighborhood of $1.5 billion. The decision is currently under review by the Commission, following a rehearing completed last week, and if past history is any test, the decision will be appealed in various courts.

Now, no one likes to be responsible for raising consumer costs, but there was an economist named Adam Smith who pointed out in his Wealth of Nations, the bicentennial of which we are also observing this year, that the supply of any commodity is responsive to price. The Federal Power Commission is obligated by law to provide consumers with an adequate supply of energy at a reasonable cost. We regulate interstate electric and natural gas prices, and consumers must recognize that the bargain basement prices are gone, probably forever. But it is interesting to note, to put things into perspective, that the average residential cost of electricity was 4.2 cents per kilowatt hour in 1938. By 1969, it had fallen to 2.21 cents per kilowatt hour, about half the 1938 price. By 1975, it was 3.6 cents, still about 40 percent below the price of nearly 40 years ago.

Virtually every major economist agrees that natural gas prices have failed to keep pace with rapidly raising costs of finding and producing new gas supplies. Here the fault lies both with the Federal Power Commission, which has labored under long-outdated regulatory mandates, and with Congress, which has not updated those laws. We are now experiencing significant shortages of natural gas, and in the coming years we will experience equally serious shortfalls in electric generating capacity unless the producers of electric and gas energy find it worthwhile to bring new energy to market.

We estimate that the prices established by the Commission for new natural gas production, now under review, would have the effect of providing substantially increased incentives for new gas production and for new dedications to the interstate market.

The five or six percent increase in the average homeowner's gas bill which would result from the higher rates during 1977 seems to be a small price to pay for increased adequacy of gas supplies; and of the $1.5 billion total cost increase, the U.S. Treasury would receive more than half.

Furthermore, while there have been varying estimates of how much more gas will be produced at higher prices, I have seen no economic analyses which refute the principle that more production will in fact occur at higher rates than at a lower one. The term "cost-based" is one regulators deal with constantly, but how can we determine the real costs of our actions? What is the cost to consumers if we price gas so low that not enough gas is produced and consumers must depend on other fuels at even higher prices? What is the cost to the nation if our pricing policies or, indeed, the lack of them, as a result of continued delay, result in growing reliance on imported energy, adversely affecting our balance of payments, our environment and our national security?

In the short time of less than a year that I have served as Chairman of the Federal Power Commission, I have become convinced of two things. First, regulatory agencies, such as the Federal Power Commission, have an essential and useful role to play in the structure of government. And second, a major overhaul of the ways in which those agencies fulfill their responsibilities is long overdue.

One of the changes we can make is to provide for broader public participation and recognition of the problems involved in the major decisions now being made by both economic and social regulatory agencies.

There are clear and present dangers in the Federal regulatory process as it now exists. Some of these hazards are inherent in the system itself, or have come to be a part of it over the years, but others result from outside influences and from the increasing tendency to establish even more layers of regulatory and judicial review.

A very basic problem at the Federal Power Commission is that we are simply swamped with paperwork. It's been said that the Commission is the single best source of work for unemployed and underemployed attorneys in Washington. The truth of the matter is that it is no joke. During the past seven years our electric rate case load at the Federal Power Commission has increased ten-fold, from 35 cases in Fiscal Year 1970 to 320 in Fiscal 1976. While last year we concluded three times as many cases as the average during the years 1971 through 1974, we are still losing ground. While the numbers may be different at other regulatory agencies, the result is the same: a vast and increasing caseload which frustrates both the intent and effectiveness of regulation. So we must consider dramatic alternatives if there is to be any real hope of making regulation the effective and responsive mechanism of government it is meant to be.

When problems arise in areas subject to regulation, as they have with energy over the past several years, the public wants action and it wants quick action. But even if we are successful in minimizing the time for the administrative process, our decisions are always subject to judicial review. In past cases where major decisions have been challenged in the courts, the time-frames of months for Commission decisions have been stretched into years by the judicial process. We must remember that while the Constitutional provision for due process is a fundamental one, due process was never meant to be "no process." This doctrine must be used as it was intended, to guarantee fair actions, not to prevent any action. So to be effective, regulation must be timely and responsive to the immediate needs of the public.

Clearly, that is not the case now, and major changes need to be made to improve the process. The civil rights groups have pointed out in recent years that justice delayed is justice denied. What is needed is regulatory reform which examines and treats the causes of the system's failures, not just the symptoms.

There are, in my opinion, two essential prerequisites for reform which can make regulation work the way it was intended to. The first requirement is responsible accountability, both for regulatory agencies themselves and for the commissioners and administrators who head them. The second necessity is vastly improved procedural authority to deal with the problems of regulation as they exist today, not as they were decades ago.

I believe strongly that the increased public call for regulatory reform should be reviewed, not as a threat to the regulatory process and to regulators themselves, but rather as unprecedented opportunity to do some real reforming and restructuring of regulation.

Even within the framework of existing laws, the Commission has taken a number of steps to revise and improve its own operation in ways that advance the goal of increasing public participation in our part of energy decision making. We have encouraged greatly increased public input in regulatory issues at all stages of our activity and this has been an increasing priority. For instance, we have held a growing number of regional hearings outside Washington in areas directly affected by specific issues, in an effort to allow and encourage the participation of those most directly involved, in the proceedings which ultimately determine regulatory actions. For many months before the President signed the "Government in the Sunshine" Act, our regular Commission meetings have been open to the public, as will now be required of all regulatory agencies. A comprehensive data bank of regulatory information is now nearing completion and this system will be available for use by Congress, state commissions, and members of the public to obain up-to-date information on cases currently pending before the Commission and the total information available as input to those decisions.

But more needs to be done to change the system so that it works better. We must find some process or system which allows more general public interest participation and, at the same time, permits decisions to be made, and permits them to be made more rapidly than they are being made today.

The country needs, and each citizen needs, the quickest possible solutions to those problems, and the simple fact of the matter is that the regulatory system has lost the capability of reaching timely decisions. The regulatory process takes too long to be the effective tool it should be in finding the answers to our energy problems. It has been three years, almost to the day, since the Arab oil embargo brought the phrase "energy crisis" into everyday use in this country. Yet in that three years, the only real energy issues decided have been stop-gap emergency measures designed to deal with the immediate situation. None of the vital long-term issues--plant siting, natural gas wellhead price controls, coal utilization and many others--have yet been fully resolved.

Discussion for years often allows manageable problems to grow to proportions which may become virtually insoluble. What we need is a way to decide issues, decide them fairly, to decide them quickly. If regulation can be restructured to accomplish those goals, then it will be far better able to serve the public as it should.

As you consider the six case studies before you today and tomorrow, and as you plan your participation in other energy issues, I would like you to keep a few points in mind: participation in and criticism of the regulatory process or of the decisions themselves is the best and frequently the only way we have of determining what the effect of pending actions will be on those who are directly concerned. It seems to me, though, that every person who intervenes in a regulatory case has two responsibilities. The first is to ask himself or herself whether a planned intervention will, in fact, contribute to the overall public benefit in the long run. The second is to contribute positive suggestions for constructive alternatives to objectionable energy projects.

The vocal opponents of nuclear power are rarely heard supporting surface mining or any other alternative energy source which can meet the need for electric power in the same time frame that nuclear could. The advocates of increasing dependency on solar power, geothermal steam or other advanced, renewable, less polluting energy sources rarely tell us what we should do to bridge the gap between the present day and the time, several decades hence, when these new sources hopefully will begin to be economically viable. Those who vigorously oppose such hydroelectric projects as the ones recently proposed for the New River rarely state what energy projects they would support to replace the ones against which they battle. I note, for instance, that in one of the cases before you today--the Sears Island case--sites at both Riverhead on Long Island and Sears Island were rejected. I think the question we should ask is what does Consolidated Edison do in the meantime for low sulfur oil supplies?

Granted that in each case opponents may have an entirely legitimate complaint about a given energy installation, and granted that all of these complaints deserve to be heard, the fact still remains that a no-growth attitude to energy is, in the present context, both impracticable and, in my opinion, undesirable.

We need to know not only what not to do, but also what to do.

Public input can be of great value if it does both, recognizing the comparative costs and trade-offs of taking and not taking specific energy actions. Constructive criticism and suggestions almost invariably help in achieving equitable solutions to energy problems. On the other hand, destructive and dilatory intervention is worse than no public participation at all, since it frequently delays decisions to the detriment of all.

For regulation of any sort to be worthwhile, its benefits must exceed its costs. Too often inertia has kept Federal regulatory policies in place which have long since become outmoded and counterproductive and fail to serve the needs of the present time.

We need to get broader points of view before us than we have had in the past. We must find some way to balance local interests with the broad national interests.

I am concerned that unless we find some way to resolve issues to provide alternatives to energy problems, there will be a strong reaction when the next energy crisis comes. The danger is that in the interest of expediting a solution to that crisis, all that we have gained by more general public interest participation will be lost and discarded in the interest of expeditious solution.

The point I would like to leave with you is that we need to decide to decide issues and then decide them. All of you can help in the process, and I hope you all will.

BIOGRAPHY OF SPEAKER

RICHARD L. DUNHAM is Chairman of the Federal Power Commission. Mr. Dunham has a career of public service primarily in state government in the State of New York, where he has served in a wide variety of posts including Deputy Director of the Budget, and subsequently Director of the Budget under Governors Rockefeller and Wilson. He was appointed Deputy Director of the Domestic Council by the President in March of 1975, and has then continued with the federal government as the Chairman of the Federal Power Commission, confirmed by the Senate on October 7, 1975.

COMMENTS

MR. CHERRY: My name is Myron Cherry; I am a lawyer. Chairman Dunham, you emphasized public responsibility throughout your remarks. I have the following question. Everybody who practices on the industry side and the government side before the Federal Power Commission not only has this practice or participation financed but also has the ability to lay [the costs] off across a large group of people--ratepayers in the case of utilities, and the American public in the case of yourself and your staff. Yet when this issue of financing public participation came up some time ago in the Second Circuit, your agency fought very hard against the possibility of providing any funds. How do you expect the public to get involved and take seriously the idea that you want them to be responsible if you make no way or method for them to finance their participation? And let's posit for the moment that their participation in these circumstances will be as responsible as the participation of those you regulate.

MR. DUNHAM: That is a tough and very controversial question at the present time. I will try to answer it this way. I mentioned that historically the normal interventions have been people who have been focusing on the cost elements, in other words, on rates. There certainly have been ways for those people to participate; they have agencies or groups which have intervened and continue to intervene.

of consideration for financing broader interest has run around, is the new elements--environmental broad energy solutions, and so forth, aspects other than just the traditional economic arguments.

From a political science standpoint, historically and I think properly, Congress and the Congressmen themselves are supposed to represent the public interest. That is the democratic method in its broadest context. I consider, and I am sure my fellow Commissioners do, that our job is to participate in the total decision, in the public interest.

Now, anybody can say that's inadequate. They may say Congressional participation is inadequate or that the regulatory commissions themselves do not in fact represent the public interest. The problem comes with the next part of it. If you concede that there should be some public method of financing broader public participation, including environmental groups, including consumer groups, including many, many other aspects, what process do we have to decide who they are?

The traditional process is through election every two years to the House and election every six years to the Senate. Who decides who the new "public interest representative" should be? Who decides whether one committee called "energy committee" or another one called "energy supply committee" or somebody called something else should receive funds from the Federal Power Commission, if that is where the appropriation would come from? My problem is, under a democratic system I don't know how to locate those groups or choose them. Does anybody have any suggestions in that regard?

MR. CHERRY: Chairman Dunham, I don't know that that is an answer to my question. I didn't ask whether or not it's possible under the realm of democracy to implement the notion of helping people. I said, how do you expect to have public participation without having financing? I would like you to address that question.

MR. DUNHAM: I think my answer to that is, we certainly do have plenty of public participation now. Certainly in all of the controversial cases, there has been. I think the New River case is a perfect example of that, although that went to the Federal Power Commission some number of years ago. There was a way for that decision under the regular democratic process to get resolved, and turned down.

My problem is, how else do you do it? We have interventions in all of our major cases by such organizations as the Sierra Club and many other environmental groups. I think that there are ways for that. We serve public notice of pending actions, and people have written in with ideas. I just don't know how else to do it. There is no answer.

MR. CHERRY: Are you supporting a bill to get some money out of Congress, if you feel that is necessary, to aid the groups like the Sierra Club and others, or would you support such a bill?

MR. DUNHAM: No. I am on the record opposing such legislation. I don't know what mechanism you have; would it be a number of subscribers, the number of participants in a particular group? The basis of my argument to Congress in that regard was that I wouldn't know how to make decisions on who should represent the public. If Congress wanted to designate that so-and-so is to represent one particular point of interest and somebody else is to represent some other interest, I think that's fine. I am just saying I don't know how the agency would decide that.

MR. CHERRY: Is that question less vague than finding out what the public interest is?

MR. SUNDQUIST: Let me cut this particular line of discussion off and say we will pursue this in each of our five working groups; and it would be my hope that at the end of this conference we might come up with a serious answer to Chairman Dunham's question of how you would do it.

MS. SIDEBOTHAM: Good morning. I am Diana Sidebotham from the New England Coalition on Nuclear Pollution. You have just answered my question. But I hope that we do address this very fully at the end of the conference because I think Mr. Dunham is caught in the dilemma he was discussing a moment ago.

Delay means "action denied." And I think that this is one of the things that the citizen groups here are most concerned about today. The participation of the citizen groups is severely hampered by lack of funding, and I think you should know that very definitely, from one who is a participant and has been for a number of years.

MR. DUNHAM: I certainly sympathize. I understand the problem. There is one case that has 33 to 35 thousand pages of testimony, and it's a very important case. It's one that has lots of environmental and energy impact elements; and I really can see the problem. I know the problem we have in analyzing the record even with all the people on our staff, but I still don't know how you would decide on who the public interest representatives should be.

MS. SIDEBOTHAM: Well, we are hoping that perhaps there will be some suggestions at least by the end of the conference, and I will be here waiting to see what comes up.

MR. DUNHAM: Let me know the results.

MS. SINCLAIR: My name is Mary Sinclair and I teach at the University of Michigan, but I also was a principal participant in the Midland Nuclear Reactor Licensing hearings. I found a number of assumptions that I consider totally false as a basis of your talk. For example, in discussing delay as caused by public participation, I think we have to go deeper than that and challenge the whole decision making process of how you arrive at different courses that you are deciding on for energy choices. I would say that the public has been denied access to the decision making process itself.

Then, as far as offering solutions, you completely omitted very obvious solutions, some of which the National Science Foundation has contributed to substantially, and these lie in the conservation of energy. Those of us who have been concerned with nuclear power know of at least two areas in which conservation of energy could displace and in fact provide more energy than anything that the nuclear power industry can provide, without the risks. Conservation of energy, through industrial co-generation of electricity was examined in a study that was financed by the National Science Foundation. Its principal author is the energy director of Dow Chemical Company, Gerald Decker. This procedure could provide half of all the industrial needs for energy by 1985 if it was implemented. I have heard no sign that the Federal Power Commission, or any other agency that has the power to do so, even suggests that it would be done. The other suggestion for conservation that would more than adequately provide for our power needs for this interim period has been described by the American Assocation for Architectural Engineers; it is having energy-efficient buildings and retrofitting buildings. Both of those are solutions that have been discussed. Citizens have offered them and I see no implementation for them; so I consider the basic assumption of your talk false from my point of view.

MR. DUNHAM: Let me comment on that. One, I didn't mean to imply that the delays were due solely to citizen intervention. We have one case that is 6,895 days old. The delays were certainly not due to citizen participation, but to factors beyond anyone's control.

With regard to your second remark, in my opinion the basic legislation of the Power Act and of the Natural Gas Act must be revised. Both pieces of legislation are 40 years old. They have not been revised at all extensively. Now, the significance of that is this. The Natural Gas Act demands that the Federal Power Commission do two things, provide an adequate supply and at a reasonable cost. It says nothing about conservation. It is an economic equation, not a conservation equation.

Now, within that phrase and within the Power Act there are some things that could be done on conservation. With regard to your last remarks and with regard to the National Science Foundation study and other proposals on conservation, the Federal Power Commission is now considering incremental and marginal pricing, which is one of the ways available as a possibility to achieve conservation. We do not have the authority, under existing laws, to require that all buildings shall have certain elements. But indirectly, through economic methods, we can, and will, and are, considering some actions which have that effect.

MR. DELOGU: Orlando Delogu, University of Maine. As a short question, why isn't it appropriate to perhaps provide funding to those groups that achieve intervenor status in various regulatory proceedings? We certainly make certain determinations as to who should be accorded that status and, having accorded it to them, it seems in that particular context they might be the most appropriate groups to receive some level of funding that would facilitate their intervention.

A second question, what is this public interest that you seem to treat in most of your remarks as some homogeneous commodity? I have often been persuaded there were many publics and many interests and I have a hard time deciding what the public interest is.

MR. DUNHAM: Your last remark is part of the problem we face: how do you decide the public interest. As I noted earlier, under our democratic system that is for Congress and the President to determine, through the legislative process.

In regard to the financing of those to whom we grant intervention status, that is a possible mechanism. But we would need some definition or guidelines that would help us define who the intervenors should be. If somebody asks to intervene, the basic legal requirement is that they make the allegation that they are representing the public interest. If we decide that that allegation is not correct, that in itself is subject to judicial review. I am saying that we need some guidelines or definitions. Those guidelines could be set out in legislation, but that poses the same problem that the second part of your question did: How does Congress decide who those intervenors are?

MR. DELOGU: We accord that status, or do not accord it, in almost every regulatory proceeding today.

MR. DUNHAM: The Federal Power Commission, at least, tends to accord status to almost everybody. I can think of no denials except perhaps in what appears to be dilatory intervention. That is one of the problems. Perhaps it is our fault for not exercising more control.

MR. KADAK: My name is Andy Kadak, from new England Power. I think we are being a little bit naive about this whole question. You have raised polarization, and questions about improving the regulatory process by getting public participation. I think what we really have to address is, let us say we get public participation; let us say we fund it. What is the net outcome of this? If you have five board members, one of whom represents the public or two of whom represent the public, we will have perhaps a three-to-two decision, and we will have gone through the process but where will we end up in general? I think in the courts again. So I am just wondering where this is all going. We asked for public participation, but what does it really mean?

MR. DUNHAM: I would agree with those comments.

MR. WARREN: My name is Charles Warren, I am a California legislator. I am somewhat disturbed by the tone of the comments this morning. It seems to me that there is a whining aspect in that the regulators are suspicious of public intervention and are upset with the judicial review. What is being suggested is apparently a reduced level of public involvement, and a shortened or truncated judicial process. I suppose what it comes down to is why do you believe that there is such public distrust in our Federal regulatory processes?

MR. DUNHAM: Well, I think there is public distrust in the regulatory processes. I did not mean to imply that that resulted from increased public participation. One factor in some participation is a lack of emphasis on the broad public interest. There is a need to decide these questions because we as a nation, in my opinion, cannot await 15 years of litigation; and we have had many cases which have involved 15 years of litigation.

In the case study analysis that the Wall Street Journal did of the Kaiparowits project, one of the things that worried me was what Secretary Kleppe said when he said the project was cancelled: "What is going to happen?" Well, nothing is going to happen in terms of substitution, I think his quote was, "until the lights go out in San Diego."

When the lights go out in San Diego, then the public will demand immediate answers. It takes, as we all know, about 15 years to construct a nuclear plant; it takes 12 years for a coal plant today, with the air pollution requirements. There is nothing that we can build quickly that meets all these requirements except oil-fired burners, which pose other problems in terms of increased imports of foreign petroleum.

One example of the need to decide issues was the oil pipeline in Alaska. That was debated and argued for years and years and years. Then the oil embargo came, and wham, Congress met and decided the issue.

MR. MOORE: My name is Arnold Moore, from the American Petroleum Institute. First, let me clarify a matter of fact. Congress recently extended the FEA and, in the process, did legislate what I think of as national building codes requiring insulation and mandating that buildings which do not meet the standards which are to be established over the next couple of years could not be financed by any bank or savings and loan or any other institution which is either regulated by or operated by the federal government, which means virtually all lending institutions. So, with respect to the little exchange about insulation, it's now a matter of public law. I don't know who is responsible for enforcing it.

MR. DUNHAM: FEA.

MR. MOORE: More generally on the question of who it is that represents the general public, I was a little puzzled when I got my invitation. I knew I was going to feel out of place and so far I haven't been disappointed. But it seems that the general idea is that the government doesn't represent the public; and the various industries that might be involved, like the electric utilities and the oil companies and coal companies, don't represent the public; and the Federal Power Commission doesn't represent the public; and some of those groups are elected--the Congress doesn't represent the public, obviously--and so we now have the development of a new group of groups, a new industry which is now here seeking funding, which is selected by a different process. It says, well, we represent the public. I would just like to pose a puzzle, of whether there is some way to discover the extent to which the unorganized public has an opinion about any of these things, and whether the unorganized public can be represented.

I mean this as a constructive suggestion of the kind you are asking for. All of these other groups are to some extent self-selected; even a Congressman I suppose is self-selected in the sense that some people decide to run and others don't and the only ones that can get elected are the ones who decide to run, so everybody is self-selected somewhat. I guess all these groups are tarred with that problem. How do you find out what the public that isn't organized and whose lights may go out in San Diego is thinking about the environment or nuclear power, or other things? If we can't think that the other self-selected groups represent them, can we convince ourselves that these public interest groups do, or is there some way we can find out what they think more directly? I think that would be important in deciding this other question of whether you want to foster the organized groups by paying their legal fees or whatever the proposal. I put to you, is there some way you can convince yourself on these two issue?

MR. DUNHAM: As I said, I can't. That is why I opposed the bill.

MR. SUNDQUIST: I think that's a good question to refer to our five working groups.

May I say that I hope we have such a broad spectrum of representation here that everybody will feel out of place.

WORKSHOP PROCEDURES

JAMES L. SUNDQUIST

The planning group concluded very early that you cannot discuss this question of public participation in the abstract. You have to get down to cases. So we have built this conference around six cases. We arranged for case studies to be prepared and they have been provided to you.

Today we will hear those cases presented, so that we will all have the same body of factual knowledge to work with when we go into our working groups. We have time for only three of them to be presented in depth by the people who participated in the controversies. The other three will be presented in a more cursory fashion subsequently.

Each of the working groups will focus upon one of these cases except for one working group that will have two cases. The groups will not be restricted, of course, to discussing that one case because we want everybody to bring his or her experience, in whatever cases they have been involved in, into the discussions.

We have phrased four questions for each working group to try to come up with some kind of consensus and possible concrete recommendations with majority and minority views, if necessary. Then when we return here after the working group meetings , we will hear reports from each working group, focused on each one of the four broad questions, with discussions on each one as we proceed.

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CASE STUDY
PANELS

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INTRODUCTION TO CASE STUDY PANELS

MAX D. PAGLIN

I want to note that the purpose of our discussions this morning should revolve about the questions of public participation by citizens' groups. The courts have already, in several landmark cases, firmly established the rights of citizens' organizations to appear and participate in proceedings before administrative agencies and to represent views not otherwise adequately represented. The question, of course, is how can that representation be made in a meaningful and effective manner.

This particular workshop should involve an examination of the need and the purpose for public participation, the advantages of public participation, the disadvantages, the problems; how can the various actors in these proceedings make their views felt in an effective manner.

In 1971, Professor Ernest Gellhorn and I, as the Chairman of the Committee of the Administrative Conference of the United States, first introduced to the Plenary Session of the Conference, the recommendation on public participation. (It seems Professor Gellhorn was a little before his time.) I expressed my view at that time that the name of the game is to assist the agency to reach an informed and valid decision which it is charged by law to do, after taking into consideration all of the diverse points of view; but that

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those diverse points of view should be presented in an effective and meaningful manner; and the critical question is, how can that be accomplished. We hope this workshop will examine these questions on the basis of the different actors who have been involved and the different viewpoints which have been presented and how that can best be done.

For each of the case studies it will be the task of the lead speaker to present and summarize the facts and issues of that particular case, and then go on to give his point of view. The other commentators will then give their points of view.

We hope, as I have tried to emphasize, to examine the role of public participation, the nature of the process involved and the problems encountered. We hope to avoid, if we can, the generic questions of nuclear power as against no nuclear power, and the general energy debates that are going on. We wish to examine these particular cases which are before you and see if we can come up with some lessons to be learned from them, so that public participation, as such, can be more effective.

BIOGRAPHY OF MODERATOR

MAX D. PAGLIN has been an attorney for 31 years, working in Federal regulatory agencies, mainly the Federal Communications Commission, where he has been Assistant Counsel and General Counsel. He has been a member of the Atomic Safety Licensing Board and he is now a consultant to the Administrative Conference of the United States.

EMERGENCY CORE
COOLING SYSTEMS

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ENERGY CORE COOLING SYSTEMS
PANEL PRESENTATION

BY

GUY H. CUNNINGHAM III

U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Our topic is certainly very broad and at this point, I think, still ill-defined. I expect--and the questioning earlier this morning certainly indicated--that it will lead us to a very spirited interchange of ideas.

I have no illusion that my own views which I express this morning will necessarily meet with general acceptance here. Again, I think some of the questions addressed to Chairman Dunham indicate that some of the views I may state this morning will meet with a lack of acceptance at least on the part of some of the participants in the workshop. Nonetheless, I will be satisfied if, on the basis of my acquaintanceship with the Atomic Energy Commission's rulemaking on Emergency Core Cooling Systems, I will be able to offer a few observations which will evoke response and stimulate discussion during the remainder of this workshop.

By way of preamble, a word about my relationship to that Emergency Core Cooling System rulemaking is appropriate. Unlike Mr. Cherry and Mr. Edgar, the other members of the panel, each of whom participated throughout that two-year rulemaking as advocates on behalf of particular participants, I did not become involved in the subject matter of ECCS until after the hearing record had been closed and

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certified to the Commission for decision. My role, along with two technical consultants, was that of draftsman and advisor to the Commission as it proceeded to decide the issues that had been identified in that massive record. I should emphasize, though, that while there were three of us serving as advisors and draftsmen, the decision in that case was solely that of the Atomic Energy Commission. We spent many long hours, both collectively and individually, with each of the Commissioners in arriving at that decision which was promulgated nearly two years after the rulemaking began. The role that I had, though, makes it appropriate for me to offer the fairly standard caveat, that the views I express this morning are my own. They are not those of the Atomic Energy Commission nor necessarily those of either of the successor agencies, the Nuclear Regulatory Commission or my current agency, the Energy Research and Development Administration.

The Emergency Core Cooling System rule making was a rulemaking conducted and initiated by the AEC with the purpose of examining certain interim performance standards for a backup safety system known as the Emergency Core Cooling System of Nuclear Power Reactors. The issue which the AEC sought to resolve was whether those interim standards should be retained in the form originally promulgated or whether they should be modified and new revised standards should be issued.

When the proceeding got under way, in a hearing format, the participants consisted of several representatives of the nuclear industry (the manufacturers and vendors of nuclear reactors and electric utility customers of those vendors), the Atomic Energy Commission's regulatory staff (which had a particular point of view and was a proponent of one version of a proposed rule), and finally, a coalition of some 60 public interest intervenor groups known as the Consolidated National Intervenors (CNI), represented by Mr. Cherry.

The case study very adequately, I think, captures what was perhaps the most distinguishing feature of this two-year rulemaking. It was protracted and it was characterized by bitter extended procedural wrangling and rancor. Those are negative aspects, but they are the first ones that come to mind in the view of many who recall the ECCS experience. I would like to focus this morning, if I can, on some of what I think may have been contributing factors to the protracted length and the extreme polarization of views characterizing this proceeding.

In that context it would be useful to examine at the outset a few basic facts about the initiation of this rulemaking, which was frankly viewed by the Atomic Energy Commission as an experiement. As originally announced, the rulemaking was to have been strictly a legislative hearing with opportunity for submission of written views, and oral statements, but with none of the adjudicatory features, such as cross-examination, which characterize a trial-type proceeding.

Largely in response to concerns expressed by Mr. Cherry on behalf of his clients, the Commission promulgated a set of procedural rules which did incorporate many--but not all of--these adjudicatory features. It was some of those not adopted, such as discovery and subpoena power, which were the focus of later controversy.

Though not recognized by the Atomic Energy Commission as such, I think this experiment had a second half. That was the "as low as practicable" rulemaking proceeding which was conducted in a nearly parallel time frame, slightly behind the ECCS schedule, but under precisely the same ground rules.

I would call attention to four of the ground rules established for the conduct of this proceeding. The first, as I have already mentioned, is that no discovery or subpoena power was provided. Now, the AEC encouraged in its statement of the rules and, in fact, I think in practice (albeit largely in response to prodding from CNI) saw to it that, before it was all over, all the expert views available to it were incorporated in the record. The second feature I call to your attention is the fact there was cross-examination of the witnesses who appeared--cross-examination which ultimately consumed the 125 days of hearing time. The third distinguishing feature of this rulemaking was the Commission's announcement ahead of time, that, like an adjudicatory proceeding, it would be conducted on the record. Specifically, the Commission's Rule 2 provided that the Commission's determination in the rulemaking proceedings would be supported by the record: "If reliance is placed on information which is not in the record, notice will be given of such information and an opportunity provided to comment thereon and to request the opportunity to respond thereto." The fourth feature which made this proceeding somewhat unique, at least to AEC, although certainly not in the concept of administrative law that we know in this country, was that the Hearing Board did not have a decision making function. Traditionally, the Atomic Energy Commission's Atomic Safety and Licensing Board had heard evidence and decided such cases. This Hearing Board, composed of three Atomic Safety and Licensing Board members, had the sole function of gathering evidence and certifying the record to the Commission for decision by the Commission.

For the remainder of my comments, I would like to focus on first, the development of the record, which was the basis of the decision, in light of those procedural rules, and then second, the actual decision making process utilizing that record.

I would assume that we are all agreed, as a fundamental premise of this workshop, that decision making, including energy related decision making, should be as good as we can possibly make it, and further that this means that all responsible viewpoints should be available to the decision maker. I think we can go farther and perhaps have general agreement that where there are sharp diversity of views and differences of opinion that there must also be means of probing and testing those varying views. I will not go so far as to suggest that we would all agree that cross-examination is appropriate in every energy related decision making context.

In this case cross-examination was used and probably was essential, but for the moment, if we can have this agreement about the need for the public input, then let's put that part of the equation aside and focus on the "energy related decision making" aspect of this proceeding. I submit that there is a great deal of room to quibble as to whether, in fact, the Emergency Core Cooling System was "energy related decision making," at least as I would define that term. It is not really important to resolve that semantic argument as long as we recognize what ECCS rule making was all about.

It was a rulemaking dealing with complex technical standards governing these Emergency Core Cooling Systems for nuclear power reactors. A frequently used, but admittedly imperfect, analogy is that these performance criteria are akin to speed limits. If we use that analogy, then the question was, should the speed limit here--these performance standards--be retained at 55 miles per hour, be raised to 60 miles per hour, or lowered to 50 miles an hour. But the question was not, continuing the speed limit analogy, do we eliminate the passenger automobile from the interstate highway system. Similarly, if we abandon the analogy, the question posed in this rule making proceeding was not, and, in my view, should not have been, do we eliminate nuclear power as an element of the nation's energy supply.

It was, I believe, in part, the reluctance of participants, notably CNI, but other participants as well, to accept this definition of the issue, that contributed to the protracted length of the proceedings and the polarization. My conclusion in that regard is reinforced by what I referred to as the other half of the rulemaking experiment, the "as low as practicable" rulemaking. That proceeding was conducted under similar ground rules, but was characterized--in contrast to ECCS--by a lack of division, a lack of bitterness, a lack of extraneous argument. So I come to my first tentative conclusion this morning. That is, that public participation is valuable to the decision maker only if it is directed toward the decision to be made. Not every instance of energy related decision making is an appropriate vehicle for examining the fundamental issues that are at the core of today's energy debates.

Let me return now to the public participation part of the equation which I momentarily put aside on the assumption that it would take care of itself. I reiterate that our goal should be to insure that all responsible points of view are made known to the decision maker. It is fair to assume, in the present context at least, that the regulated industry will take care of itself and make its views known. A little bit more troublesome, perhaps, is the matter of handling the agency's own expertise, since, as the ECCS experience demonstrated, there may well be a divergence of opinion among the agency's own experts. I will also put aside the question of the resolution of these internal disputes, in recognition of the practicality that at some point the agency staff will have to speak with one voice. I hasten to add, however, I am not in any way condoning the cover-up of internal dissenting views. I think the ECCS experience shows that those dissenting views within the AEC staff eventually--again I have to give partial credit to the CNI for assuring that this was the case--came into the public record.

But the greater concern that we have in this workshop is the much less well organized, presumably less well represented public which may indeed have valuable input and valuable contributions to make. Certainly we are agreed that that public should be represented in decision making of this nature. The problem of how to assure representation of that public input is that there is almost never a single, unified, identifiable public position, but rather a composite of several individual private viewpoints which may represent very small or indeterminate segments of this overall public. The motivation behind the presentation of these viewpoints may be widely varied. In some cases it may be a particular pecuniary interest, such as that of an affected land owner in the vicinity of a proposed energy facility; it may be fear on the part of the technically ill-informed; it may be fear on the part of the technically well-informed; or it may be based on a moral judgment. But I suggest that the impossibility of defining a single public viewpoint means we cannot assume the responsibility of lumping all these elements together to indentify one single public viewpoint, nor can we assume the responsibility of seeking out the representatives of the public input. My own view, borne out, I think, by the history of the ECCS licensing experience in general, is that those with genuine concerns, representing a major part of this overall public input, will in fact come forward.

Now, I have skirted the issue which is probably going to draw most of the focus of this workshop. That is, of course, financing of those representatives of the public interest, once they do come forward. Mr. Sawicki's case study quotes an estimate of some $500,000 as being the amount necessary to fund an adequate intervention in the ECCS rulemaking proceeding. I don't propose to dwell on the subject, but I would suggest that had that kind of money been available--$500,000 for a public intervention--there would have been many additional claimants representing additional points of view, perhaps differing from that of CNI. In short, my concept of public participation recognizes that the opportunity to present the view of CNI or any other public participant must be available. I am not prepared, at least at the present, to go further and find a need for public financial support of the presentation of that viewpoint.

In the ECCS rule making there was controversy about inclusion of another point of view. That is the view of the Advisory Committee on Reactor Safeguards. That Committee is a body created by statute and is charged with the responsibility of making reports to the Commission with regard to the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards. The ACRS invariably makes these reports of its views known to the Commission in a letter addressed to the Chairman of the Commission, and expressing a collegial or consensus view of the Committee. Occasionally, but only infrequently, separate statements of individual members of the Committee are appended to that letter. In this case the report of the ACRS on the ECCS criteria that were proposed was ambiguous and, in the view of many, internally inconsistent. Largely for that reason, the Consolidated National Intervenors desired to subpoena and cross-examine individual members of the Committee in the course of the ECCS rulemaking.

The matter had not been addressed specifically in the ground rules established by the Commission, but upon certification by the Hearing Board the Commission focused on the issue and approved a practice whereby the Board could transmit certain interrogatories or written questions to the ACRS, which could then respond to them in writing and send the answers back to the Board for inclusion in the record. This approach, approved by the Commission, preserved the collegial aspect of the ACRS reporting to the Commission. There was no cross-examination. Mr. Sawicki, in his case study, has suggested that the Commission probably erred here, and they should have permitted cross-examination or other direct questioning of individual members of the ACRS. I happen to disagree.

It is interesting to note that the same issue was recently before the United States Court of Appeals for the District of Columbia Circuit in the case of Arschliman vs. NRC, which was an individual reactor licensing case, the Midland case. In that case, the issue again was whether members of the ACRS should have been amenable to discovery. The Court held that it was clear that where the ACRS report was vague, and on its face had material ommissions, it was necessary that there be supplementation; but it went on and agreed with the Commission that discovery of individual members of the Committee was not the appropriate way, but that a remand, or referral back of the question, and asking the ACRS for expanded views was the appropriate method. I think the course followed in ECCS probably went even beyond what the Court ultimately required some three years later. In my view, it was certainly an appropriate compromise.

I would like to turn for a moment to the matter of some of the problems that I perceived in the course of assisting the Commission in arriving at a decision on the record it had. They relate to the Rule 2, which I mentioned earlier, the requirement that the decision be supported by the record. That proposition has two corollaries. First, that the decision makers could rely only on what was in the record and, secondly, they had an obligation to consider everything that was in the record.

As for the first, the requirement is that they could consider only the record. The Commission in issuing its opinion noted that certain information developed after the rulemaking had closed and brought to the Commission's attention but outside the context of the record suggested and only suggested (it certainly wasn't definitive) that the ECCS rule could be relaxed, or if I refer back to the speed limit analogy, that the speed limit could be raised. The ground rules, Rule 2, of course, provided that if the Commission wanted to consider that information, it could reopen the proceedings, allow cross-examination and presentation of rebuttal testimony. That was a practical inpossibility in this case. The proceeding was nearly two years old when the information came to the Commission's attention. There was wide agreement that a decision was in order, was due, was long overdue, and, therefore, the Commission decided the case without considering that information, noting the possibility, of course, that the rule could always be amended in the future, after appropriate procedural treatment of that additional information. It might be worth observing that, to my knowledge, the rule has not been amended in reflection of that information.

Now, in pointing this out as a problem, I find no fault with the Commission's refusal to rely on information outside the record. That was perfectly proper and essential. I only submit that it indicates there is a price to be paid for this judicialization of technical decision making. Here there was, in essence, a forced disregard of some information known to exist. Had the information been of a different character, pointing in the opposite direction, I don't think there would have been disregard. I think there would be an obvious requirement that you open the proceeding and take the consequences of extended delay.

The second aspect, that of considering everything in the record, is obviously something I also do not find fault with. It is principled decision making at its best. The problem here lies with the particular record that we had. As I mentioned, it was extraordinarily lengthy and a great deal of that length was taken up by material which did not bear directly on the issues to be decided--the procedural debates, the lengthy arguments about what was and wasn't proper for the scope of this proceeding. The technical consultants working with the Commission in deciding this case did what I think was an amazing job of reading, absorbing, and testing and treating the whole record.

Now, I have previously identified one reason why I think the record was so bulky and that was the refusal of at least one participant to recognize the definition of the issue to be treated. I think perhaps another reason, and this is certainly my own view only, since I have never spoken with the Chairman of the Board or any of the Board members on the subject, is that the unique role of the Board, unique at least in AEC experience, in not having any decisional responsibility may well have contributed to that lack of focus. Knowing that these Board members would not decide the case but that others would decide the case on the basis of the record compiled by the Board, I think there must have been a natural tendency to bend over backwards and make the record as complete as possible. I suggest in this case it was perhaps too complete.

Finally, one other aspect of this on-the-record decision making deserves discussion. That is the matter of the treatment of proprietary data, data which in other contexts is known as trade secret information. In the normal AEC, now NRC, licensing process this proprietary data is received on a confidential basis. It is made known to counsel for the intervenors under protective orders which prevent its further disclosure, but all parties to the proceeding have access to the data for the purposes of the proceeding. It is, however, not spread upon the public record. That system in the past has worked reasonably well in individual licensing cases. The problem takes on an entirely different order of magnitude, however, when we get into a rule making proceeding where, first of all, you have various competitors involved in the same proceeding and, second you are going to promulgate a rule of general applicability and you have a requirement that it be supported by a public record. Certainly everyone agrees that neither the ECCS rule nor any other generally applicable rule should be based upon secret evidence which the Commission declined to make public.

The Commission again, during the course of the proceeding, had to offer interim guidance to the Board. It approved a procedure for the course of the hearing by which the information would be received, under proprietary or under protective orders; it would be made known to counsel for all parties who could then advise their clients but without actual disclosure of the contents of the proprietary information. Counsel were thus able to participate in in-camera sessions where the information was discussed. The Commission, in approving that rule, noted and reserved that "we would underscore that our present holding is confined to treatment of proprietary information during the hearing phase of the proceeding. Should such information form part of the basis for the ultimate rulemaking decision, the Commission will again, and in that context, adddress the question of the information's public disclosure."

Well, that problem which the Commission deferred came back to haunt them as they decided the case. A small bit of proprietary data belonging to one participant was deemed to be an essential underpinning of at least one part of the rule. Accordingly, the Commission availed itself of the opportunity it had reserved and unilaterally made the information public. The immediate problem was solved to the presumed dismay of the one vendor, the owner of that data.

But residual problems remained. There is not time to focus on them in detail, but I will identify what in my view are some of the considerations. Presumably all data, proprietary data and other data, submitted by the parties was submitted in the belief that it was relevant that suggests at first blush that it should be available to the public on an unrestricted basis. That view, though, on reflection, is too narrow. There are certain legitimate interests in the protection of trade secrets which must not be weighed in the balance. That may be something we can discuss further in this workshop.

On the basis of this potpourri of observations and impressions based on my acquaintance with the ECCS rule making, I offer a few tentative conclusions: The ECCS experiment was far from an unqualified success. The delay in the decision making, over two years from the time the rulemaking was first announced until the case was decided, was probably intolerable. Certainly, the absence of a decision was particularly difficult for the industry and other participants who would have to live with the rule ultimately promulgated. The rancor and bitterness generated during the course of the proceeding was extremely painful to the Commission, as was the exposure of internal dissent within the Commission. It is my view that that exposure of internal dissent will prove, in the long run, to have been healthy, and CNI in large part deserves credit for that.

I think lessons were learned from the ECCS rulemaking which will provide a takeoff point for future rule making.

The decision in the case certainly did not receive universal acclaim. The nonbelievers weren't converted. But I think the objective observer would have to conclude that there was meaningful public participation in this case, there was an opportunity for the public to be heard, the public was, in fact, heard and the public voice was in fact reflected in the decision.

For all the pain, then, it is my view that this experiment in rulemaking was worthwhile.

BIOGRAPHY OF SPEAKER

GUY H. CUNNINGHAM, III is currently the Assistant General Counsel in Charge of Litigation and Legislation at ERDA. Prior to that, he was Assistant General Counsel for Opinions and Review at NRC. He is a graduate of the Georgetown Law Center, and he served as an Assistant United States Attorney for the District of Columbia for several years.

EMERGENCY CORE COOLING SYSTEMS
PANEL PRESENTATION

BY

GEORGE L. EDGAR

MORGAN, LEWIS & BOCKIUS

Let me begin by trying to give you some of the flavor of what the ECCS proceedings were about. You had a situation where twentieth century technological questions of great complexity were being considered in a sixteenth century courtroom atmosphere.

Now, you mix the lawyers and the engineers--and having a stripe of both, I can extend some sympathy--you run into some real anomalies. It's probably best illustrated by this colloquy that developed during the hearings: Dr. Quarles was one of the Hearing Board members and was Dean of the Engineering School at the University at Virginia. During the course of the hearings one day, Dr. Quarles, in response to some remarks by Mike Cherry, went into a rather lengthy dissertation on the subject of engineering judgment to the effect that, in fact, in the absence of complete precise information on any given issue, it was possible for the engineer to make worst case assumptions and to apply judgment so as to come out with a safe or conservative answer. Mike, as he was wont to do on occasion, came back to Dr. Quarles and said, "Well, what do you do with your engineering students who for four years in the exercise of their engineering judgment keep making mistakes?" Dr. Bach, the other Board member, popped in and said, "Well, we send them to law school."

So, on that note, maybe I could say a few words on what this process is about; secondly, how it might be made a little more meaningful; and thirdly, perhaps I could turn to address the question of financial assistance.

Now, we have heard the terms "public participation," and "public interest;" they are very difficult terms to define. Let me start with accepting Mr. Cunningham's definition, but take it one step farther. What we are talking about is a process, a hearing process, and that process is designed to enable interested persons to participate, to obtain resolution on disputed issues of material fact. Someone has to decide it and it is a forum for resolution of disputes. It is not a forum where polite dialogue occurs on philosophic matters of energy policy. It is a disputes resolution mechanism.

Now, given that definition, there is an ultimate and, I think, overriding public interest in making certain that the decison making process is fair and efficient. No one--and particularly not the public interest--benefits when parties lose sight of the ultimate objectives of the hearing and the decision making process becomes acrimonious, lengthy, and chaotic.

I believe ECCS was all of those.

The basic objective of the hearings was consideration and adoption of a set of performance standards for adjudging emergency core cooling systems. As one means of accomplishing that objective, trial type procedures were made available. But the basic objective, for the most part, was obscured. In fact, in my view, the means, cross-examination, frequently became the end, and the objective was lost from view.

To view the hearings from the top side, there were 125 days of evidentiary hearings. The transcript comprised some 23,000 pages. The record, counting the transcript and exhibits, totaled approximately 55,000 pages. One hundred and five hearing days were spent collecting affirmative evidence. Seventeen days were spent on the redirect rebuttal evidence. And four days were spent on the environmental hearings.

Now, with the benefit of hindsight, and I should emphasize that, we should pose the question as to whether the hearings did provide a fair and efficient framework for resolution of disputes and for the Commission's ultimate decision. In my view, the procedures and the mechanism were fair to a fault. The dispute procedures were not subject to limitations. We began with a presumption that cross-examination would be allowed.

The issues were not defined, and from the beginning of the hearings until the end, questions and arguments transpired as to what was the appropriate subject matter for the hearings.

I think in significant part, the process did not provide a means of meaningful decision making. There was an excessive focus on personalities, on procedural issues, rather than the technical merits of the criteria.

As one example, there was a considerable amount of cross-examination which I would label as involving comparative expertise. Questions were asked of one expert, do you think Brother X is a greater expert than youself. I suppose, logically, one could correlate all of these questions and come up with the view that you could rank experts in hierarchal order based on the questioning. The same line of logic would lead you to conclude that the Seattle Seahawks may beat the Washington Redskins consistently, but I don't think comparative scores is really a meaningful means of developing a record. I believe that the result of this was that the decision making process was inefficient to the extreme.

I would propose that we can identify three major sources of delay and disruption in the hearings, and that there are straightforward and meaningful reforms that can be effected to preclude this sort of situation.

Again with the benefit of hindsight, I believe that the Hearing Board in any future proceedings must be given the basic tools with which to run the hearings. They were not given those tools in ECCS, and in particular, they were not given tools to govern consideration of the scope of the hearings, proprietary information, and document production.

With respect to scope, in my view the only way to arrive at a scope which is meaningful in a broad ranging rulemaking hearing is to reverse the presumption. Do not start with a presumption of cross-examination. Start with a legislative format. Have all parties, proponents or opponents or whatever, present their views. Then, as the record shows, the existence of real disputes requires any person wishing to use adjudicatory or trial-type procedures to resolve those disputes to show the need and utility for those procedures. I believe the record bears out the fact that this approach would lead to a reduction and a greater meaning in terms of the dispute's resolution. As I mentioned earlier, the affirmative case in this proceeding required 105 days for collection. The rebuttal case, where the issues were narrowed and the disputes identified, required only 17 days.

Proprietary information--it was not until the 31st day of the hearings that rules were developed for handling proprietary information. On the Board's initiative and that of the parties, a detailed set of rules was developed. Any interested party in the proceedings did receive all information whether proprietary or not. Mike, I think, will agree that any information that one of the manufacturers had that he might claim to be proprietary was made available to him. Once the rules were established, then all further arguments ceased.

Document production--it was not until the 50th day of the hearings that all documents became available. If all documents had been produced at the outset, I would anticipate a very substantial reduction in the amount of argument.

None of the measures I have suggested is novel. In fact the Commission's GESMO proceedings reflect this experience, and I would suggest one additional measure. That is that the Hearing Board should be authorized by the Commission to write an initial decision, or at least render an advisory opinion to the Commission. This approach finds support in the legislative history of the Atomic Energy Act.

I think, as a practical matter, it would lead to considerable increase in efficiency in decision making in that the Commission would have only those issues before them with which the parties take exception to the initial decision. Secondly, if the Board is writing the initial decision, if a given party were to place undue emphasis on procedural questions and away from the technical merits, I believe that that would clearly impact their credibility and that would operate to the detriment of the party in a trial-type atmosphere.

The issue which seems to be prominent in the case materials and in the question this morning concerns financial assistance. It is my view that on the ECCS record there is no support for the grant of financial assistance for this case. I think the real question is, were the proceedings lengthy and chaotic because CNI had insufficient funding, or did CNI have insufficient funding because the proceedings were lengthy and chaotic. In my view it is the latter. And if the basic procedural reform which I previously noted were implemented, the hearings need not be lengthy and chaotic.

Going beyond this, it might be well to consider, in the absence of financial assistance, would CNI or did CNI lack the proper technical assistance, competent counsel, and ultimately, would a better decision have resulted.

Now in terms of CNI's opportunity to participate and the technical assistance afforded them, aside from the opportunity to cross-examine more than 30 witnesses from the vendors and AEC staff, and apart from its own technical assistance, the AEC made the entire community of experts available irrespective of their view. There were six witnesses available from Aerojet Nuclear, four from Oak Ridge National Laboratory, two dissenters from the NRC staff, and one from Battelle Memorial Institute. The Commission made a special exception and allowed CNI to file interrogatories of written questions to the ACRS. All in all, CNI took abundant opportunity to cross-examine. They cross-examined on 60 of the 122 days of the hearings on the safety phase. None of the other six major parties took even half as much time.

The question of availability of competent counsel--there is no argument here. In my opinion CNI had a more than competent counsel and I will ask you to judge for yourself.

Lastly, I think most importantly, it is well to consider whether financial assistance would have resulted in a better decision.

Before I address that, I might ask the question as to what is better. Is a decision better because the results are acceptable to CNI or the results are acceptable to the industry? I suggest that neither is the case, that in fact CNI viewed the ECCS proceedings as a go/no-go decision on nuclear power. They brought two unsuccessful lawsuits to shut down the reactors on the theory that the interim criteria were inadequate. They brought but did not prosecute an appeal from the financial decision. I think if more resources were available, and in my view that would be difficult to do, I would anticipate more and not less litigation and no change in the result.

So, to summarize: In the context of the ECCS case, the record contains a clear message. Participation of individuals and groups is not an end in itself. It is not in itself coextensive with the public interest. There is a broader public interest in sound, efficient administrative decision making. When, as in ECCS, the adversary process is carried to an extreme, it is counter-productive. In this case the solution is not financial assistance, but rather a recognition of the experience and reasonable limitations on the adversary process.

BIOGRAPHY OF SPEAKER

GEORGE L. EDGAR is a partner in the law firm of Morgan, Lewis & Bockius in Washington, where he is primarily engaged in nuclear regulatory matters and government contract litigation. Mr. Edgar is a graduate of the Thayer School of Engineering at Dartmouth College. He also has his law degree with honors from George Washington University. From 1964 to 1969 he was a nuclear engineer on the staff of Admiral Rickover, who was the Director of Naval Reactors. In the ECCS case, Mr. Edgar represented one of the vendors, Babcock & Wilcox.

EMERGENCY CORE COOLING SYSTEMS
PANEL PRESENTATION
BY
MYRON M. CHERRY

I really think that the more we get down to the question of analyzing public participation--and I hope that in at least listening to my side of the issues--and that is all it is, is my side--all it can be--you have to place a differentiation between having the public present and wanting the public to participate.

Let me give you an example which I have never told to the general public before. I think it illustrates the mechanism I am talking about. At some point during the ECCS hearings, Daniel Ford, who was an economist like James Schlesinger who was running the Atomic Energy Commission, was told he didn't have sufficient expertise to participate in the decision making; even if that were true--and I don't mean this deprecatingly--he was, after all, all we had, and he did put together an amazing focal point of debate--that Daniel Ford could not participate in either testimony or cross-examination.

I decided halfway through the hearing to make our stand there. And I got up and left the hearing, literally, like that. And Henry Kendall said to me, "Where are we going?" I said, "Henry, let's go to Boston for the weekend. They will call us."

Sure enough, about Friday afternoon, a day later, I got a call from General Electric's counsel saying they would permit Daniel Ford to participate if we would come back and finish the hearing.

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Now, did General Electric by that decision really believe that Daniel Ford could make a contribution to the record? I don't think so. Did General Electric by that decision care about public participation? I don't think so either. I think the reason that General Electric did that is because they knew as well as I know that if the public had not been present in that proceeding, the decision wouldn't have been worth a damn. Having the public present permitted the agency to argue the illusion that the public participated, to wind up with the situation of agency expertise. So that is a very, very important distinction to make.

I think that Mr. Dunham's views about nonrecognition of the public probably help; and I think Mr. Edgar, whose views I enormously respect as a rational attorney, admits to miasma of irrationality and is probably saying the same thing when he suggests that public funding really won't help. I think what he is really saying is that public funding goes to the question of participation and not presence. Since the public can be present without funding, why give them any money?

Some of the problems with respect to the ECCS hearing, I think I would like to present this way: The Atomic Energy Commission was not used to any hearing process that had any resemblance to fair decision making. Now, whether that was just a historical accidenct or a conscious decision making, it is clear that in 1971 the agency simply was not equipped to handle any kind of a solidly engineered controversy of any kind.

Secondly, I don't think that the agency wated to have a hearing which could lead to a major substantive difference. There is a lot of talk in Mr. Sawicki's article that the Atomic Energy Commission chose from among various alternatives, the utilities, CNI, and the staff. But that really is a lot of crap. Everybody knows that by and large the regulatory staff position is more often than not adopted by the agency. While I cannot prove it at this point, I think if I had the opportunity of cross-examination of some of the Commissioners, I would be able to demonstrate that there was sufficient cross-pollination so that the decision of the regulatory staff issued early on in the decision making process through the staff's testimony was a foregone conclusion approved by the Commission. I think anybody who sits in Washington for very long knows that that's the way the process works, and talk to the contrary I think is nonsense.

The other reason for the hearing--again you will notice that all of those reasons for the hearing had nothing to do with soliciting anyone's viewpoints because I don't think that was the purpose of the hearing at all, which obviously leads to the conclusion that the hearing didn't really accomplish much from that standpoint because it didn't start that way--the hearing was called by the Atomic Energy Commission in the context of trying to defuse a tie-up of 16 licensing hearings in which I and others had raised the emergency core cooling systems hearing; all of those licensing hearings had been foreclosed from raising the issue; it was a clear reversal of error on each one of those cases in the Court of Appeals. So they decided to have this kind of rule making which is now an apparent favorite device of the NRC--to have this kind of generic thing instead of rule making--to permit licensing to go on of nuclear power plants while they can kind of ply the philosophical suggestion that they are solving these problems with some sort of a rule making business.

The hearing process was also not marked with either respect or judiciousness. I think this was a process, once again, of how the agency viewed the proceedings. For example, on several occasions throughout the hearing, I was [un]officially asked by members of the Boards and others that I was doing a very nice job but, after all, enough was enough; I had accomplished my purpose and if I went too far I would break the system. And I told them that I didn't think enough is enough, but they certainly were in charge of the proceeding; if they thought I was going too far, why didn't they stop me officially. In short, in many aspects the hearing process was a joke because everyone who will be honest with an overview will admit it was a joke.

By a joke, I don't mean to suggest it didn't accomplish anything. In fact, I think it was enormously important to help stimulate a national debate on nuclear issues and public participation. It revealed weaknesses in the regulatory system, including outright dishonesty. In fact, I probably have spent more time in motel rooms with AEC witnesses who told me they were forbidden by people in the General Counsel's Office and higher from saying certain things and if I asked them the next day the question in precisely this fashion they would have no choice but to answer it and therefore I would get an answer. This went on all during the hearing process. Everybody knew about it. The AEC didn't do anything about it because they were embarrassed about the information getting out and everybody just kind of accepted the kind of lack of judiciousness with it. I am always amused when gentlemen retire after two years to examine the ECCS proceeding and presume it contains some method of respectability.

I think also that the ECCS hearings demonstrated that nuclear decision making had gone on far too long without a realistic debate at any particular place.

But the hearings, in my opinion, were a joke. And I think at least in my analysis, using that harsh work just to get your attention will give at least some basis for my recommendations.

The issues were carefully drawn by the AEC to foreclose debate on important issues. The whole business that was going on in the late 1960s and early 1970s and continues today was whether or not the public had been adequately informed of risks and safety systems, et cetera. The AEC chose to ignore the existence of that debate and, as McKinley Olsen has recognized in one of his articles, the real issue is people and money, not pipes and valves, and so the AEC went down to try to have a hearing on pipes and valves and it didn't work.

There was a conscious withholding of information and a molding of the hearing process toward a preconcluded result. Everyone was so fearful of change or not enough change that no one wanted or did trust the hearing process. And thus everybody essentially ignored the process for greener pastures, such as the press.

As a matter of fact, Nucleonics Week probably did a better job in understanding the issues than any of the decisions of the Atomic Energy Commission, and the reason was that the reporters became familiar, got down and asked the questions over and over again about what was really going on, something the Commission never did and doesn't give any indication of wanting to now.

As I indicated, the emphasis of the agency was on the public rather than on the participation part, and the agency, it seems to me, just wanted to demonstrate that somehow the public was involved rather than to really have them participate.

I don't think that the rules of the hearing process were well thought out. I don't think the AEC officials in charge of the proceeding were noted for their brilliance in understanding controversy or advocacy although I think they were brilliant and bureaucratic in inertia, and I think they were chosen for that purpose. I think what the AEC did was be very fearful of this "experiment" and they selected persons who would hopefully participate in the ultimate resolution of just keeping everything kind of quiet; and everybody continued to pass the buck on. It was infuriating to many of us, including myself and other lawyers who participated, not just on the CNI side. When you do that you have frustration in the process. When you have frustration, you create rancor. When an expert issues a decision and refuses to be criticized for his expertise, you begin to have more than just rancor.

I come now to my recommendations for public participation. Number one, and foremost, I think the public must really be invited in and, if so, I don't think there will be very many problems in identifying them. I think that there are many rules of practice in agency decision making which identify a particular interest; and it seems to me that once that interest is sufficiently capable of being brought into the system, then it ought to be funded. I think this is particularly true with the NRC or agencies like the NRC which have an obligation to have a public hearing.

I am always amused by the notion that a public hearing can be defined by four walls, a room, a microphone, and a court reporter. That, obviously, is how the agency very often views its obligation. I remember that before I got involved in AEC hearings, the first of which lasted nine months, the one just prior to that involving even more complicated issues lasted four and a half hours with a long lunch.

It seems to me that public participation cannot be done without adequate funding, the cost of which must be factored into the overall costs of decision making either in the rate base, through the agency budget, or in some other socially spread-out way. It is just simply incredible, to use a mild word, that a utility can charge back the cost of its participation to me, but then I have to donate my time to represent another rate payer who simply doesn't agree with the utility or hasn't had an opportunity to get involved with the utility. If we were talking about sixteenth century notions of noblesse oblige, that certainly ought to rate with that one.

Finally, there must be traditional due process, openness, with cross-examination and subpoena power. If you are going to have a hearing, have a hearing. If you want to have a cocktail party, then have a cocktail party, but don't call a hearing a hearing without the kinds of things which lawyers have shown over the years are essential to openness and honesty.

If I or CNI are thanked for exposing dissent in part because we participated in the process, don't think about the positive aspects, think about the negative aspects. What if we weren't there or if there was not some form of subpoena power?

The fact remains that dishonesty went on during that period of time and that ought to be a continued cause of concern, not the fact that we are going to spend another $100,000 in deciding whether we are going to build a $2 billion facility.

Finally, let's throw away the shibboleth of delay. I am sick and tired of hearing that every time I get up to exercise rights given to my clients, I am somehow participating in a delay process. If you don't want me or others to delay decision making, then invite me in early enought and put away enough time so that the decision can be made properly.

Don't expect me to digest a nine-course dinner over a five-minute lunch time. I am going to get indigestion and, when I do, I am going to get angry and my frustration will be taken out on the process, and so will yours.

If you are invited grudgingly into a situation and told, "We really want you in but we really don't have very much time for you," you are going to get angry. If you need any other kind of result, talk to your lady or your wife, if you are a man, and your man if you are a lady, and consider how she or he would feel if you said you didn't have much time for her or him because you had something else important to do. I think the process is one of lovemaking in the traditional sense because we are all supposed to be part of society; but it isn't going to work unless everybody respects everyone else's views and does not say things that are almost ridiculous by definition--that interests which are adverse to traditional ones somehow can't be identified.

Finally, I think we need professionals involved in decision making. Since 1972, I and several lawyers of different persuasions, including some of the most well-known utility lawyers in the United States, have been petitioning the Atomic Energy Commission to get hearing board members with qualifications. That has not yet been done, to my knowledge, although there is obviously a process where more people are being brought in. But by and large people who sit on hearing boards either come from the industry or are looking for long-term advancement within the agency and are simply not going to take critical issue with agency decisions, particularly if it is a single issue oriented agency like the NRC.

Finally, I think that we must have an overall and related procedure in the agency to raise policy issues. If the AEC or Congress had at some point--today it has not as yet occurred--had an overall open and honest debate about the economics of nuclear power or the cost-benefit judgments which are made in rules and regulations, I think people like myself would probably never have gotten in the process of fighting nuclear power plants at all. I became a believer in the opposition not because I oppose nuclear power, but just because I was incredibly disgusted with the decision making process. And eventually my disgust led me to opposition because I could not believe the decisions made through that process were worth a damn.

The use of funding--experts need to be paid, costs and travel and transportation; lawyers need to be paid. Without freedom of the purse you will have frustration of the process. That is what ECCS was all about.

If you do not understand what a public group, a responsible public group--and I am more than willing to give the agency the opportunity to cut off your irresponsibility; that decision is reviewable; I have no question with that at all--if you are going to have problems, like Mr. Dunham seemed to do, in the recognition of what the public is or how you fund it, turn the question around. Why don't you say what interest am I today pursuing? How many people do I need to pursue it? How much money am I spending? Et cetera. If you can made that judgment--in other words, if you can take yourself from nine o'clock in the morning until five o'clock in the afternoon, you can surely help someone else along.

BIOGRAPHY OF SPEAKER

MYRON M. CHERRY is a graduate of the University of Illinois and Northwestern School of Law. He has been in law practice, particularly in the public interest law field and in energy matters, since 1961. He has been a participant since 1970 in some of the principal nuclear reactor cases: Palisades, Midland, Point Beach, Zion, and the ECCS Case.

DISCUSSION

MS. WEISS: Ellyn Weiss, Attorney General's Office of the Commonwealth of Massachusetts. The question is for Mr. Cunningham. Is it your observation that the purpose of an intervention and the purpose of a hearing is to bring as much responsible opinion as possible to the decision maker? Could you explain to me how and why the Commission decided rather than to present the pros and cons internally within the staff on the ECCS rule making, to present the staff position in a monolithic way and then allow dissent to be brought out in a slow and painful manner, certainly the manner most damaging to the AEC's credibility during the process of the hearings?

MR. CUNNINGHAM: The short answer is no, I can't explain it. I would point out, of course, that the staff wasn't the decision maker. The staff was an advocate. And I think the process requires that an advocate of any position has to speak with one voice. The staff could have been a lot more frank a lot earlier in the process in making known the internally different views. They came out eventually. I think one of the lessons of the ECCS rulemaking was that they could be brought out earlier.

MS. WEISS: How can they be brought out consistent with your opinion that the staff has to speak with a single voice?

MR. CUNNINGHAM: What I am saying is, there has to be a single official position, at the same time making known the existence of separate views, a minority viewpoint.

MS. WEISS: Did that ever happen at any hearing you know about?

MR. CUNNINGHAM: It came out in ECCS.

MR. KADAK: I would like to ask Mr. Cherry a question. You seem to say or suggest that if the public is invited in, and a responsible public at that, to the hearing process--and, let's take GESMO as an example--you then select a board of people who would, let's just say, be the decision maker who could make a decision without undue influence from either party. Let's assume such people exist. Are you now also saying that that will be the end of it? And there will be no more recourse to the courts if you disagree with the decision?

MR. CHERRY: Mr. Kadak, I marvel at your ingenuity. As soon as I criticized someone for saying that the public is present but shouldn't participate, you want them to participate but not real hard.

My position is very simple. I am a lawyer and I respect institutions which respect the democratic process. It is not very secret that I don't have much respect for the Nuclear Regulatory Commission, and I really don't choose to participate in their proceedings because I don't respect that system. If I respected that system, then I would participate in it. Now, some of my colleagues in the environmental movement respect that system a little more than I do, but I don't know very many lawyers who, when they are among their own, will really admit that the process really makes them feel comfortable.

Now, if I were faced with a process that made me feel comfortable and if it was a process that didn't have subpoena power and documents (which really is just a reaction that something is being withheld), then I suppose I would respect it. If there was a decision at the end which was based upon substantial view of the record and my view lost because of a value judgment in the administrative process and I didn't think that was arbitrary, sure, it would end there.

I have tried many cases to the conclusion of the trial court without going up to appeal. What is fundamentally important, if you believe my viewpoint has any credibility whatsover--and we have won a few in the courts that indicate there are some people out there who believe the stuff we are talking about in part--then work on the system and say to yourself, what is it that I am doing wrong that doesn't make them believe us? Because that is what it is really about. I simply don't believe you.

MR. PAGLIN: Mr. Sawicki has asked for just a brief comment: He is the case writer of the ECCS case material.

MR. SAWICKI: I would simply like to point out that included with the general packet of information there are some addenda to the case studies, including mine. There were several changes made in my case study without my approval. These were made at the request of Mr. Cherry, and what bothers me in particular are two sentences which have been added to the abstract. I refer to the final two sentences; they are Mr. Cherry's words, not mine. I mention that for the simple reason that those two sentences refer to what has been discussed quite a bit this morning, the question of paying intervenors in cases like this.

MS. SINCLAIR: I am Mary Sinclair. I am one of two women that organized CNI and I know the circumstances under which Myron Cherry had to undertake defending that position and what the circumstances were of other licensing procedures around the country firsthand, and so I would like to have the opportunity to present that, because that is not a part of the record included here and I think it is very significant.

We were given just three weeks time to organize a group of citizens that would participate in the national rulemaking hearings. Our hearing in Midland was denied the right to pursue the safety hearings regarding ECCS, even though it was our group, the Saginaw Valley Nuclear Study group (which, by the way, includes at least 10 PhDs from Dow Chemical and Dow-Corning) that had disclosed the fact that the ECCS tests had gone on and that they had all failed and that the AEC had neglected to tell the public about this. But we found it out. Because of our disclosures, all the licensing procedures in the country began to include this information.

When we were denied access to have this information heard, the national hearings were called, and all the money we had left at that time was $3500. On this basis, Myron Cherry had to decide that he would go into the national hearings and leave the corporation in which he was involved. If you consider this an adequate financial situation to pursue as serious an issue as this, if you think that this is an adequate stance for the public to have on issues of the magnitude that the ECCS hearing ultimately was able to disclose, then I would like to address this question to George Edgar: Just examine your conscience here and now and discover whether you would have made such a decision, left a productive position in which you had prestige, and undertaken a situation in which you risked your career, your financial future and the prestige that you have enjoyed--

MR. CHERRY: I will answer that for George. I thank you Mary. I believe George would do that because he is a good guy.

MR. EDGAR: My answer is I adopt Myron's answer, but I will answer your question seriously. I think it is a mistake to probe people's motives. I have never once doubted Mike's sincerity and his belief that what he was doing is right. I also believe that Mike's sense of responsibility to his clients and his adversary skills are both very deep. If Mike chose to do it, I respect him for doing it.

I can tell you that if I felt the same way about the same issue, I would do it.

I do not feel that way about this issue. I do not believe that the interim criteria were wrong. I am morally convinced that they were not. And the question of whether I would leave my current position to fight the interim criteria is one that I cannot answer.

MR. PAGLIN: Might I just say, the whole issue of public funding I trust will be explored in your working groups at greater length than we have in this group and we will present an opportunity to go into it together with a discussion of the pending legislation for these very purposes.

MR. GELLHORN: Ernest Gellhorn, Arizona State University. I have a question primarily for the government and industry participants, but it might also be responded to by Mr. Cherry. That is, the emotion of the proceedings which you are describing obviously continues into this room. The thing I am concerned about is that the proceeding which you are describing is one that reflects an earlier stage in other agency proceedings, the Federal Trade Commission back in the early 1970s, the Federal Communications Commission in the late 1960s.

I was wondering whether you think the procedures that Congress has now mandated for the Federal Trade Commission in its sponsorship of public participation in rule making through the 1974 amendments to the Federal Trade Commission Act might be helpful and useful to public participation in energy proceedings. Specifically, let me refer to a couple of items. One, they provide for a million dollars of financing for public participants. Two, they recognize the Commission's criteria for paying and selecting those participants. These are: first, are they identifying a new issue; second, are they making a substantial contribution; third, is anybody else making a contribution on that issue; and fourth, could the participants who are seeking to raise new issues be consolidated.

Are these workable alternatives? Are the other procedures adopted by the Congress for the Federal Trade Commission, in terms of limiting cross-examination to those situations where a disputed issue is determined to exist by a hearing examiner, applicable to the proceedings which you are describing here?

MR. EDGAR: May I ask a clarifying question? You had a premise about the emotional content of the proceedings. Can we separate that from the question of the desirability of legislation along the lines of the FTC?

MR. GELLHORN: I think so.

MR. EDGAR: Would the FTC-type legislation lead to a reduction in emotional content?

MR. GELLHORN: No, that's not the question. The question is, is it applicable here, because the FTC proceedings initially, and the FTC proceedings--if you go back to the Church of Christ in terms of the FCC and if you go back to the intervention by the students in the Campbell Soup case and in the Firestone case--also had incredible emotional content and the attorneys had just as much rancor apparently as existed in the proceeding which you are describing. It would seem to me, in fact, to draw the analogy closer, that the rancor has disappeared from those two agencies' proceedings in terms of its destructiveness because of the procedures adopted and processes encouraged by the agency.

MR. EDGAR: My response to you would be that that form of legislation would not reduce the emotional content; it would not reduce the rancor. The issue is a polarized issue. It has a great deal of emotional content. We are talking about the content of a substantive issue. I do not believe that procedural solutions will in any way ameliorate the emotional content.

One thing that has been overlooked here is that although we have heard a lot of discussion, and I would say conclusions, concerning how the system makes it tough on intervenors, the fact is, if you look at the rules and the decisions concerning intervenor participation in NRC licensing cases, those rules are extremely liberal and extremely soft, as they have been construed.

Starting with intervention, there is an extremely liberal standard for intervention. I think it is safe to say as a practical matter today, interventions are not opposed. Secondly, there is no burden of production placed on an intervenor as a practical matter. It is only incumbent upon him to raise a colorable question, if you will. Lastly, there is no burden of persuasion on any intervenor's contention. The applicants are placed in the difficult, and I think somewhat illogical, position of disproving an intervenor's contention. In other words, an applicant must, by way of anticipation, disprove or prove a negative.

It would seem to me that one obvious corollary or necessary condition of any financing legislation would be that the intervenor must assume concomitant burdens. I do not find in any of that legislation, including the FTC statute, such a burden.

MR. EBBIN: My name is Steven Ebbin. I should remind George, if we follow Mike's analogy of the processes of the love affair, if you take the emotion out of it as well, and you haven't any time for it, it is no damn good. I would point out, however, that while we have discussed citizen participation _ad infinitum_ here, we have not really discussed the matter of the independent adjudicatory process.

It escapes me how anyone can insist on certain kinds of procedures being followed by intervenors, in a process that is essentially stacked against them. There is not even the trappings

--and I sat through 100 days of the ECCS hearings--there were no trappings of independence; there were no trappings of a judicious system. It escapes my judgment as to how, where an Atomic Safety and Licensing Board is constituted by the AEC (now NRC), and the staff has an equal participation as a witness on the one hand, and provider of the major technological input on the other hand, and is also a part of the same agency, how we can expect to have judicious opinions.

ENERGY PARKS
IN PENNSYLVANIA

ENERGY PARKS IN PENNSYLVANIA
PANEL PRESENTATION
BY
RICHARD A. MULFORD
PHILADELPHIA ELECTRIC COMPANY

As the lead speaker, what I would like to do first is review the history of the Energy Park Development group and the studies which it conducted in Pennsylvania; then present a brief analysis from the Energy Park Development Group's standpoint of what we did right and what we did wrong. And, of course, that involves, as you well know, a certain degree of public involvement.

To begin, the four utilities which constitute the Energy Park Development Group service roughly 70 percent of Pennsylvania. Those four utilities include my own utility of Philadelphia Electric Company, Pennsylvania Power and Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company.

Back in June of 1973, the system planning organizations--those are the groups that we call our "crystal ball gazers," who predict load growth and base their analyses on past load growth--decided to investigate the feasibility of energy parks, and they, shall we say, prepared an initial study at the direction of the managements of those utilities which resulted in the publication of a document, an internal document at the time, which was issued in March of 1974, called "Energy Parks in Pennsylvania: Where, When and How." This document was presented to the managements of the respective utilities

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and generated sufficient interest such that the managements agreed that we should study this concept further.

So in June of 1974, the Energy Park Development Group was formed. It consisted of two steering committees, one a technical steering committee formulated by vice presidents in charge of engineering, and a legal and financial steering committee, that committee being generally formulated by the financial vice presidents of the same utilities. Reporting to the technical steering committee was the Project Manager, who was appointed at that time, June 1974, and the Assistant Project Manager. I happened to be the one appointed to that latter post. And working under the direction of the Project Manager and Assistant Project Manager were two task forces, one whose prime responsibility was site selection, and the other whose primary responsibility was the investigation of a transmission system to accommodate the proposed energy park.

The two task forces set upon their work in July, and it became very apparent to the site selection task force that due to the magnitude of the assignment, a consultant would be required. And, since each of the utilities had called upon Gilbert Associates, Incorporated at one time or another to do various site selection and site investigation activities, it naturally befell that Gilbert was selected to work for the consortium of four utilities.

They were given their assignment, then, in July of 1974, to start with the entire state of Pennsylvania and come up with acceptable sites for an energy park. But first let's define the "energy park." We simply defined it as a concentration of electrical generation in a relatively small geographical area. Those were the criteria we set forth for our proposed "energy park." Some people don't like the word "park;" they prefer to call it "center." We still have used the word "park."

I have given you the definition. The range of capability that the group selected was between 10,000 and 20,000 megawatts. The period of development under consideration was the years 1984 through the year 2000. We would use only two fuel sources. Obviously, we are well aware of the shortage of natural gas, and the oil situation. Consequently, we limited ourselves to consideration of just coal and nuclear. And we selected, to the criticism of some, parks which would be constituted of roughly 50 percent coal-fired units and 50 percent nuclear units.

Of course, since I mentioned the time frame, the estimated startup was predicted to be about 1985, if it were a coal-fired unit, initially; or 1987, if it were a nuclear unit, initially. And, of course, the size of the units would be nominally in the 1,000-megawatt range. So, if we were talking of a 10,000-megawatt park, we were talking ten units.

The need for the park was predicted on the basis of system forecasts, or, shall we say, statewide forecasts, with a range of annual growth rates of from 3.5 to 7.5 percent. The 3.5 represented the maximum effort toward conservation; 7.5 percent was the other extreme and was based, of course, upon past performance. The 7.5 percent yields the doubling in power consumption every 10 years, which had been the history of the utilities in Pennsylvania up until the present decade.

We chose as the optimum rate of growth, 5.9 percent, being a reasonable growth rate to anticipate. Based on this growth rate, by the year 2000 the state of Pennsylvania would need close to 87,000 megawatts of installed capacity. By the year 1984 or 1985, the first year we considered operational units available at the park, we would have installed some 34.000 megawatts of electric generating capacity. So you can see that the differential between 1985 and 2000 was some 52,000 megawatts of installed capacity.

We didn't propose to meet that entire demand simply through the use of parks, but we did propose that the baseload component, which is roughly 50 percent of the total component, be comprised of parks as an alternative.

Incidentally, I should say our study was only based on the concept of the park as an alternative. No singular utility or the consortium had any commitment to energy parks whatsoever through the entire history of its study. Our whole purpose was to investigate this as a siting alternative to dispersed siting.

So we had proposed the park to meet this 26,000 megawatt baseload component predicted to occur in that time span from 1985 to 2000. The task forces went to work with this assignment, and it took them about three months to complete their work. Gilbert began its work in July and completed its report in November. It resulted in a two-volume study. They are rather extensive volumes. They were presented to the technical steering committee in December 1974.

Along with that report was the report of the transmission task force. Their assignment was less, shall we say, ambitious. They simply wanted to prove the viability of a transmission system to accommodate a park up to 20,000 megawatts. They did investigate four possible transmission system alternatives. They looked at 500 kilovolt and 765 kilovolt systems. They took a search into the future and investigated the feasibility of a 1,300 kilovolt system, and finally looked at a DC system operating at 600 kilovolts. Their recommendations were that any one of these systems could be considered viable, but the best choice would be the 500 kV or 765 kV. So we can dispense further with the discussion of their effort, since they did prove simply that a transmission system could be produced that would be viable for energy park needs.

More important were the results of the site selection task force's effort--I should say, the Gilbert effort. After three months of intensive investigation, Gilbert came up with 62 potential sites for an energy park with the Commonwealth's bounds, and of those 62 we considered the ten best as our candidate energy sites.

I should supplement that information by saying we were asked by the Schuylkill County Commissioners subsequent to the close of our formal study in January of 1976 to investigate potential sites in Schuylkill County. Schuylkill County is a depressed area within the Commonwealth. The one problem there is that the County is mostly an anthracite mining area, and they asked us to investigate the feasibility of locating energy parks within the county bounds, hoping there might be some use for the anthracite resources. Unfortunately, our studies were based on the use of bituminous coal and, while we did accommodate the Schuylkill County Commission with a study, it still was not based on the use of anthracite. One of the sponsors, the Pennsylvania Power & Light Company, is investigating the use of anthracite in a pilot plant. We don't know the results of that study. But our studies were primarily based on the use of bituminous coal.

As a result of the Schuylkill County Study, we did turn up with two additional potential sites to make a total of 64 sites and still the ten candidate sites Armed with that information in December of 1974, the managements of the respective utilities agreed it was about time that we asked for the State's assistance; so we made a presentation on the 17th of January, 1975, to the Governor's Energy Council. This presentation discussed the potential benefits and potential disadvantages of energy parks.

We were asking primarily for the State's assistance in promoting this idea, presenting the idea to the public, to generally get their support. We, in our discussion with the Governor's Energy Council, stated these as the public benefits: effective, coordinated land use, when compared to disper [illegible] ing; minimization of individual site licensing and permit requirements; labor force stability; efficient utilization of support services; a better match of capacity to load requirements; enhanced ability to raise capital investment through shared risks of the multiownership concept and an estimated 30 percent increase in productivity through permanent work forces, more consistent planning and on-site engineering. These were the advantages.

Now, we recognize that there were certain challenges. The first of these has shown we were quite clairvoyant in that the first challenge we cited was the need for public support. The second challenge was the site acquisition. Of course, combined with that, prior to that, would be the selection. We recognize that as a major challenge. Environmental safeguards. When you are concentrating these units, ten 1,000-megawatt units, we recognize that the effects on the immediate environment would be more pronounced than with dispersed siting. Finally, the initial financial requirements to develop the park--we recognize this as a major challenge.

Nevertheless, as a result of the presentation to the Governor's Energy Council on the 17th of January, we received unanimous support of the Council. Of course, Bill Harral, the Executive Director, began to work with us, and shortly after that Herb Jacobs was appointed by Bill as the Energy Park Coordinator of the Governor's Energy Council. We have worked up until January of this year, when as I will elaborate further the study was suspended, with Bill Harral and Herb Jacobs.

The Governor's Energy Council's first step, after agreeing to support the concept, was to hold a public hearing. This was done in Harrisburg on January 30. It was there we began to recognize that we had severe problems. The next step was to hold public hearings and public information meetings. These were primarily sponsored by the Governor's Energy Council. The public information and input meetings were to be held in each of the candidate site areas. Over the period from roughly March of 1975 through the end of the year 1975, literally dozens of meetings were held. Some were sponsored by the Governor's Energy Council; some involved the members of the Energy Park Development Group and were held at the request of various public citizen groups seeking information and answers to many of the questions that had been generated.

Well, it has been estimated by some that the groups that represented the public at those meetings were generally opposed. In fact, one estimate indicates that the general audience reaction was 97 percent against and 3 percent for, or maybe neutral to, the energy park concept. At any rate, we were subjected to much criticism. Bill Harral and Herb Jacobs particularly suffered a lot of humiliation. Some of us at the Energy Park Development Group did as well suffer humiliation. In general it was simply a debacle. That's exactly what one of our executives has called it, a debacle.

While no one has ever said openly what generated the demise of the study, I believe it was political pressure from the State legislators. And I might say as an aside, the most dismal meeting of all was held in September of 1975 with the Pennsylvania legislators. That was an absolute disaster, one meeting I hope never to repeat in my career of nearly 25 years with the utility industry. I think that meeting was a bellwether of what was to come for us. At any rate, as a result of political pressure, not only were we asked to suspend the study but also the Governor's Energy Council was left no choice but to suspend its participation in the study. This occurred on January 23, 1976.

Well, since then we have done a lot of soul searching. We, the utility group, have been accused of now going underground and continuing our studies of the energy park concept sub rosa.

Before I forget, I do commend to you this report prepared by Dr. Terry Ferrar and Dr. Frank Clemente. It presents an impartial and excellent summary of the activities of the Energy Park Study Group in Pennsylvania, as well as the Governor's Energy Council participation, and I think you will find no better document than this on the subject matter. It is an excellent summary.

At any rate, we have sat back now for not quite a year--it has been nine months roughly--and tried to do some soul searching and determine what we did that was wrong. So we had a critique. We each were asked to put our input into this critique.

I am not going to read my input, because it was rather caustic. It was never published but at least it was seen by our executives. There are some of the things in our self-critique, self-analysis, that we believe we did well. Then there are some things that we didn't do so well.

We are proud of the fact that we did undertake the study. It was a novel concept, and it still, in the opinion of all of us of the Energy Park Development Group, deserves further study. We did proceed with preliminary site investigation and the transmission study, and the results are well worthwhile. We recognized the need for State participation and support. Of course, this was the first time the utilities collectively had sought and had acquired State support in an activity such as this. We developed and maintained contacts with the NRC, ERDA, FEA and other organizations in the development of our studies. We cooperated with the various public groups to provide speakers and attempted to answer their questions, and we did this whenever we were called upon. There were three speakers representing the Energy Park Development Group who did nothing from the months of May 1975 through December 1975 but travel across the state of Pennsylvania to attend meetings at the request of those various groups.

Now, of course, we did some things wrong. We neglected the broad issues, such as the actual need for power. When I say "need for power," I mean the growth in power. We neglected to consider alternatives. One of those was mentioned this morning, conservation. However, since then we have still continued our studies in that area; and we are finding that, while conservation may result in some diminishment of load growth, it will certainly not preclude the need for future energy facilities, and a large number of new energy facilities.

We failed to recognize in our public relations programs the need to brief local leaders and opinion leaders in the communities. We unfortunately engaged a public relations consultant who was used to dealing with organizations like Uniroyal and Firestone, and what they did was deluge the news media, namely newspapers, TV stations, radio stations. We interviewed with all these groups, but we didn't get to the people. Of course, you can't adopt a media-oriented program and neglect the local leaders. Of course, the local leaders, when faced with questions they themselves couldn't answer, obviously looked to us, and sometimes we didn't do the job there that we should have, the result being we lost their support as well.

We disseminated the Gilbert Siting Study, which is a very technical document, without sufficient explanation. People asked for it; we finally gave it to them, but it should have been given with adequate explanation. You don't thrust two volumes that represent roughly a 6- to 8-inch high document in the hands of the lay public without some explanation. There is information in there that is highly technical and not easily understood.

Then, too, Dr. Ferrar's analysis that he prepared at the request of the Governor's Energy Council found certain areas of the Gilbert study that were deficient. His report, which is a public document as well, brought out those areas; so that further exacerbated the public confusion and distrust of the Energy Park Development Group. So indeed there was a major gap in communications.

We question now the wisdom in presenting the concept to the public when we did. We recognize that this was a major error. Here we were, partially through our studies, when in effect, we dumped upon the public a mass of information for which we didn't have all the answers, we were still seeking answers. They--the public--obviously were confused; they wanted answers, and we didn't have them. Again this led to further confusion and distrust.

We certainly should have gone to the public at the outset of this study--that is one thing that I think is definitely a conclusion that all would agree to--rather than partially through the study. There are some in the utility companies that believe we went too early to the public, that we didn't have the answers. Certainly this was true in the case of the legislators. They wanted all the answers in the September meeting. We obviously didn't have the answers. And that meeting developed into a session of just sheer rancor.

I think, too, that we were very foolhardy in some of the siting criteria we used. We sought, generally, the pristine areas of the state, where there was low population, adequate water supplies, and this is one thing that we learned definitely we should not have done. We went into three areas I can think of, particularly, that were dairy lands, farm lands, one a resort area. Well, those are the areas where our group was practically ridden out of town on a rail, and understandably so.

Instead of looking to those types of areas, we should have looked to areas where unemployment was a serious problem, where existing industries had moved out, and there are many of those in northwestern Pennsylvania. I might add, in northwestern Pennsylvania the proposal was better received than anywhere else in the Commonwealth because the unemployment rate was high and there were numerous areas where industries no longer were operational, primarily as a result of shortage of natural gas. Consequently, those areas are the areas we should have looked at more carefully rather than pristine areas.

Well, at any rate, I think we have learned a lesson. We have stopped our studies. We are awaiting two things. We have asked, through the Governor's Energy Council, that the Legislature consider the matter of siting legislation.

We have also asked the Legislature to look at the possibility of more equitable taxation. One of the major disadvantages to the small communities, as they see it, of an energy park concept is a result of present taxation laws in Pennsylvania. The utilities don't pay local taxes but instead pay an equivalent tax to the state, which is distributed on the basis of population. Here the community would receive all the impact, all the disadvantages, all the inconvenience of an energy park; and the major cities, the population centers, would receive all the tax advantages, and as well, of course, the power generated by those parks. So obviously you can imagine the reception from those communities was less than enthusiastic.

There is a lot to bring forth in this afternoon's meeting. I think I have set the stage to give you an understanding of what we attempted and what the result has been.

I can assure those who still believe that we are working under the table, that I issued the close-out authorization to the study this past month. There will be no further studies conducted until such time as the Pennsylvania legislature does consider the matter of siting legislation.

BIOGRAPHY OF SPEAKER

RICHARD A. MULFORD is Project Manager in the Mechanical Engineering Division of the Philadelphia Electric Company. Mr. Mulford graduated from the University of Pennsylvania with a B.S. in Mechanical Engineering and earned his M.S. at the University in 1957. Mr. Mulford is a Registered Professional Engineer in the Commonwealth of Pennsylvania, and he is a member of the American Society of Professional Engineers. Mr. Mulford has served as Assistant Project Manager for the Energy Park Development Group.

ENERGY PARKS IN PENNSYLVANIA
PANEL PRESENTATION
BY
JAMES K. ADAMS
SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS

I consider it a privilege to participate in this workshop. As a Commissioner of Susquehanna County, I was closely involved in the energy park issue as it related to the identification of a section of Susquehanna County as a prime "candidate" site. I hope my comments, as a rural county official, will reflect a dimension worthwhile to consider in developing effective mechanisms of public participation, particularly as they relate to rural populations.

I want to make it clear that my comments are intended to be constructive criticisms, to provide a better understanding of problems and attitudes of rural populations and county governments.

I would like to commend, particularly, the assistance and understanding which the Commissioners of Susquehanna County received from Mr. Harral and Mr. Jacobs of the Governor's Energy Council. Through the contacts which I, personally, and other individuals who have assisted the Commissioners have developed with these men, a common understanding of our problems and viewpoints, as well as theirs, has been effected. I look forward to working with them in considering viable alternatives in solving the energy problems facing rural areas.

Lastly, I commend the decision of the Energy Park Development Group in requesting that the Governor's Energy Council bring the

Energy Park concept to the public. As I understand it, this represents a precedent.

I am Chairman of a three-person Board of Commissioners of a county in Northeastern Pennsylvania, which has no municipality with a population of over 2500 and only 3 boroughs of that size, in an area of 834 square miles. The principal industry is farming. Immediately to the east of Susquehanna County and downwind of the proposed site is Wayne County, with a similar population. Its principal industry is recreation, with farming a close second in importance.

I mention these facts to you to identify clearly the background for my perception of the events associated with the public participation. I might add here, that I believe that a basic and often repeated error is made when state and federal government bodies do not recognize that there are inherent and basic differences between the rural public and urban public; rural government and urban government. Only when this fact is recognized and the mechanisms for public participation are developed accordingly, can there be effective rural public participation in decision making processes, whatever the issue may be. On the other hand, unless these differences are recognized, the errors in approach will continue to emerge as issues themselves which may overshadow the original issue in which public participation is to be involved.

A principal deterrent to objectivity and effectiveness of the process of public participation was created by what appeared to be incomplete and delayed communications from the Governor's Energy Council and the Energy Park Development Group at the very outset. Briefly, I will relate the chronology of events at that time, as background.

The first time that the Commissioners ever heard the term "energy parks" was on March 12, 1975, when we received a report, general in nature, entitled: "Energy Parks in Pennsylvania," which described the Energy Park concept. The report, itself, did not identify its origin, but attached to it was a press release dated January 30, from the Governor's office, which summarized this new concept. No information on proposed sites was included in either the letter or the publication.

The first word we received on the designation of Ararat, a township on the eastern border of Susquehanna County, as a prime candidate site was at a meeting of the Wayne-Pike Audubon Society on April 26, in which siting information was disclosed. It was not until the first week in May that a copy of the Gilbert Site Identification Study, Volume I, was received in our office.

During that same week in May, for the first time, to our knowledge, there were very brief news releases in the area newspapers. During that same week, the Commissioners were requested to set a date early in June for the public input hearing, four weeks from the time we received the Gilbert study. In this time, we would have to plan for and conduct public information hearings.

In May, a newly formed citizens' group, quite by accident, learned that the County Extension Service had been instructed to assist in planning for these meetings. The Commissioners had not been notified that this service was available. The Extension Service, on the other hand, was holding itself available, if we asked. Five public information meetings were held during the months of June and July.

Meanwhile, the input hearing date was postponed, by the Commissioners' request, to November. It was over a month after the originally scheduled input hearing date of June 5th, and after public information meetings were held, that the specific siting data for Ararat, the candidate site in Susquehanna County, were received in our office, and not until over two months later that the Pennsylvania State Center for the Study of Environmental Polity report was made available to us.

From this review of chronology of events, in no way should it be inferred that any alternatives were possible. I do not know, of course, of the logistical problems involved or the reasons for decisions which resulted in this sequence of events. However, the overall results unquestionably were severely damaging to the process of objective public participation in its most critical stage--the initial introduction of information to county officials and to the public. Let's examine a few of the results which, at an early stage, influenced the process of public participation:

First, County Commissioners were accused of witholding information since March on the Ararat site from county residents. (There was widespread confusion between the general report, "Energy Parks in Pennsylvania, "released in March by the Development Group and the Gilbert Study, identifying the sites, not released until May.)

Second, opinions and prejudices were immediately formed regarding the energy park concept which were based on the events of these initial months and which, in my opinion, did not appreciably increase the number of opponents to the energy park concept but did create a bitterness and credibility gap that may take a generation to overcome.

Third, the Energy Council in its decision to participate in further energy park planning and research to "coordinate and facilitate" exchange of information and provide for public involvement now was viewed as an ally of the Energy Park Development Group and as standing in full approval of the concept rather than approving a further investigation of the concept. The series of incomplete and delayed communications from January through July were associated with both groups. Naturally, a halo effect involved other Commonwealth institutions. The Extension Service passiveness was viewed as reluctance; their pressure to involve speakers from Penn State University to present both sides of the issue was rejected. Whether justified or not, any representative of state-supported agencies or institutions was viewed as possessing a conflict in interests.

Subsequent information received from a variety of sources did not allay concerns regarding the State's position.

A straw that broke the camel's back was the fact that Wayne County sponsored a comprehensive study of its resources preliminary to a long-range plan for the future development of the county. The study, and subsequently the plan, identify Wayne County as possessing great potentional for recreational use, particularly in northern Wayne County which is immediately downwind of the candidate site of Ararat and bordering on the Delaware River, which is under discussion as a wild river area.

This study recommended that those lands be carefully protected at all costs from environmental and socio-economic impacts which would be detrimental to their prime values as recreational areas. This study, paid for by Wayne County, was conducted by Gilbert Associates at approximately the same time the Ararat siting study was being prepared. There is not much question that an energy park located at Ararat would very appreciably affect the resources which Gilbert Associates had advised, at all costs, be protected.

Fourth, county and township officials and responsible citizens alike, by necessity, joined in an effort to develop as many resources for obtaining information as possible in planning for public information meetings and answering hundreds of concerns of county residents. We turned to professionally competent and technically knowledgeable individuals who volunteered their services to advise us regarding reams of information which we received; some requested--Federal documents--and many more, not requested--from all kinds of radical groups.

The Commisioners from the start held that objective public information hearings with all pertinent available information should be conducted to inform the public adequately. Evidence of possible conflicts of interest, coupled with inadequate and conflicting information on all levels, obviated our best intentions. It, nevertheless, is irrevocably the responsibility of county authorities to try to provide information to the public to whom they are responsible.

I wish that state and Federal officials could spend one day in a rural county courthouse. I cannot describe the utter chaos in the Commissioner's office which resulted from the effort made to coordinate and disseminate the best information we had available to the public and at the same time answer hundreds of phone calls. The Commissioners called on volunteer groups to assist them. A request to a state agency for financial assistance to defray expenses was denied. We were informed that money may be available in the event Ararat would be chosen for additional site specific studies. In all seriousness, my response was that funding then would be needed for riot control, not to defray expenses of public participation in decision making.

What are some of the lessons we all may learn from this experience? First, the introduction of the energy park concept for public consideration and the related communications problems were not totally responsible for the attitudes of distrust and resentment. A latent, but significant, attitude of resentment prevails among rural folk, which I personally believe has some basis in fact.

The day that the energy park concept came to Susquehanna County was not "Day 1". Immediately it represented far more than an issue regarding the siting of massive energy facilities in unspoiled rural land and the subsequent urbanization, radical changing of lifestyle and largely unknown environmental impact. It became a symbol of one more example in which there is discrimination against rural Americans. As I commented in the Public Hearing on Nuclear Energy Center Site Survey held by the Nuclear Regulatory Commission in Washington in June 1975, there is not one day that goes by that we Commissioners are not faced with discrimination by being part of rural America. Allocations by health and welfare agencies are made on a per capita basis. The costs of delivering services in a rural area are many times greater than in densely populated urban areas. Regulations which accompany legislation purportedly to help rural areas are often totally inappropriate to rural situations and reflect both a lack of knowledge on the part of the state and federal governments and a bias toward urbanized areas, where centers of political control lie. Too often the result of these inappropriate regulations is the reassignment of unusable funds to urban areas. The county was faced now with reassignment of significant portions of our land to the energy needs of urban areas, at a vast cost to us in terms of our economy and our environment and what we feel are our rights as Americans.

Rural county government operates on a low tax base with a bare minimum of staff. We do not have the expertise or the manpower to be thrown into the effort that was required of us.

Second, the problems of communications in rural areas through public media were not understood, and the initial reaction to resulting delays or omissions in getting information was acutely damaging. It cannot be assumed that small rural newspapers, weekly or semiweekly, will pick up information such as a release on the presentation by the Energy Park Development Group on January 30, from wire services and print it in the county newspapers. There are four newspapers printed in Susquehanna County; two weekly, two semi-weekly. None subscribe to wire services. It cannot be assumed that larger urban newspapers in adjoining counties will automatically select a wire service release and publish it unless it happens to be interpreted as newsworthy for that urban population.

It must be assumed that there are difficulties peculiar to rural populations regarding the ability to disseminate information rapidly and completely. Until an issue becomes "news" to adjoining urban populations, broad, area-wide coverage by larger radio and TV networks is difficult to obtain. Local media assistance was most noteworthy in their cooperation, but it was necessarily limited in the geographical area covered. An interesting point, also, is that a considerable portion of Susquehanna County residents utilize Binghamton, New York newspapers and TV coverage.

Third, in developing information for public consideration, there must be an equivalent effort to insure that specific disadvantages be determined and delineated, as well as the advantages of the proposal. If "public benefits" are listed, disadvantages must be identified and specified as such, not as "problems to be overcome" or "environmental concerns". The Energy Council, for example, may have better served its avowed purpose if this equivalency of effort was apparent. The Council's cover letter on the Development Group report and the Gilbert study appeared to endorse the inequity of effort.

Fourth, the question of need for sources of energy other than fossil fuel--nuclear power--was not the issue in the minds of the majority of the public. The issue was the concept of a massive commitment of land and funds and the resulting irreversibility of the decisions in the face of many unknown factors and a rapidly expanding technology that creates obsolescence at an unprecedented rate.

Fifth, concern has been expressed regarding the "intrusion" of environmental groups upon the local processes of public participation. We do not doubt that occurred; we do know that in Susquehanna County, local residents, themselves--not allied with organized interest--made the first and lasting impact in decision making process. This impact opposed energy parks, rather than nuclear power. Later on, organized environmental interests introduced an antinuclear concept. This did not appreciably alter or intrude upon the decision making process, which had already evolved around the massive siting of facilities and the far-reaching implications. In regard to intrusion, our rural population viewed intrusion in the decision making process to be from union representation or from the adjoining urban counties with a high unemployment rate.

This experience brings another question to mind. What are the boundaries of the area from which the public should be involved? Susquehanna and Wayne Counties, or northeastern Pennsylvania, including two large urban counties with a high rate of unemployment in the building trades?

A word about what we consider to be positive results of this public involvement in the energy park issue--

First, there is evidence of a significantly higher level of awareness on the part of residents--an awareness of the part which the public can still play in making decisions, and an awareness of the potential power of other groups and special interests external to the area which can affect decisions directly relating to their lifestyle and socio-economic status--whether it be for better or for worse.

Second, an equally significant valuing process has occurred. In the beginning of public involvement, the concerns which initially emerged regarded nuclear safety and financial impacts. The continued impacting of antinuclear interest groups notwithstanding, in my opinion in the final analysis the principal and overriding concern was for the maintenance of the lifestyle of a rural non-industrialized population and protection of the rural open spaces, their most important resource.

Third, the state government holds less mystique for the average citizen, and a constructive interest has developed in considering acceptable alternatives such as miniplants.

In conclusion, we Americans must approach the solution of our problems with an understanding of the concerns and rights of rural Americans as well as urban Americans. We must make every effort to develop in total objectivity as much scientifically defensible data as possible relating to both pros and cons of the issue; consider this data in terms of short and long term effects; and recognize to what areas, what populations and what interests the advantages and disadvantages accrue.

We must recognize that our government has not in the past opted for the most efficient and economical alternative if the alternative is detrimental to minority interest. We have traditionally made decisions on national, state and local levels which are not the most economic in order to defer to the right and interests of dissenting and minority opinion.

BIBLIOGRAPHY OF SPEAKER

JAMES K. ADAMS is presently serving his second term as Chairman of the Susquehanna County Board of Commissioners and has held positions in county government for the last twelve years. He is a life-long resident of Susquehanna County, and he operates a sheep ranch. He is an officer of the Northern tier Pennsylvania Counties Planning Commission, the New York/Pennsylvania Health Systems Agency and serves as Chairman of the Susquehanna/Wayne County Alcohol and Drug Council. During 1975, Mr. Adams assumed the role of leadership in organizing and participating in community meetings, public informational meetings and public hearings as a result of the proposed siting of the energy park.

ENERGY PARKS IN PENNSYLVANIA
PANEL PRESENTATION
BY
JUDITH H. JOHNSRUD
ENVIRONMENTAL COALITION ON NUCLEAR POWER

It is unfortunate that Chapter 5 of my dissertation is going to be written tomorrow, because it has to do with our topic today. I was faced with a little non-nuclear excursion in my technological marvel last night. The Volkswagen wouldn't go and I was then faced with the alternative of having some sleep or typing out some remarks for today. I decided perhaps I would like to be in a position to respond to discussion here on the energy park issue and the subject of this conference, which is public participation in energy related decision making.

I have the feeling, as I look down the list of participants at the microphone as opposed to the workshops, that I am the only person who has been asked to speak here who actually is a member of one of those "loudmouthed" citizen organizations that dare to intrude upon the process of orderly decision making; one of those people who is being accused of delaying the development of energy facilities, whether those facilities are needed or not; one of those persons who is being essentially accused, from the earlier statements today--this starts out sounding a little paranoid, but it really isn't--of raising issues that should be decided by technical experts.

A couple of years ago when Dr. Kepford of our organization and I testified before the Joint Committee on Atomic Energy on a siting and licensing bill which would, in essence, have solved all those problems of public intervention by precluding the public's participation in the licensing procedure, Representative Hosmer, with whom I am sure most of you are acquainted, asked us to identify ourselves, and Dr. Kepford said, "Yes, we are the scum-of-the-earth faction that these hearings are all about."

I'm a little distressed at the direction that we have been going thus far, and I will get to the energy park matter in a moment. If we are indeed gathered here to discuss citizen participation, public participation, in energy policy making, then surely we should have the public--those groups that have cared enough about their own environment, who have learned enough, informed themselves enough, to be participants--to raise the issues as Mrs. Sinclair's organization and Mrs. Sidebotham's organization have done: the issues that the Nuclear Regulatory Commission and its predecessor either failed to raise or failed to examine adequately.

We should be looking at what it is that the public really does have in mind, where the stopping point is with respect to the imposition of unwelcomed energy facilities. These are the kinds of questions we should be considering in terms of, "How do we really get people involved?" Must they be only reactive after a utility has spent half a million dollars? Now, you see where I hope we will get and where I hope the thrust of the workshop sessions will be: not, "How do we keep the people out?" or "How do we structure the options so that they discuss only what we, the regulators, or we, the industry, have in mind to have discussed?"

There is a logic to nuclear power development, and I think that logic of development, which leads to integrated fuel cycle facilities and perhaps to the clustering of reactors, became evident at a fortuitously early point in Pennsylvania--where again, fortuitously I would judge for the public interest, there happened to be a number of people who had bothered to learn, to care, and to participate in the licensing procedure. They knew what the public was really up against with a study concept that was presented as merely a feasibility study and, yet, at its first public presentation, was also presented as a study to which a siting decision would be concluded within six months of its initial public introduction.

That isn't much time for public participation, if indeed that is what is desired. Certainly, from the public's point of view, it couldn't have been considered an early entry of the public into the siting or the overall decision making process.

I feel in a somewhat difficult position here because of my personal participation in the energy park controversy. I attended the initial presentation of energy parks in Pennsylvania for the public, not by invitation, although I am told that 1,000 invitations were sent out through, ostensibly, an environmental organization which in the view of the real grassroots public interest groups is very closely allied with industry, rather than with the public interest grassroots groups. I attended quite by accident, the accident being that one member of the so-called antinuclear organizations of the state, one member alone so far as I have been able to learn, received notification of what was represented as a public hearing on the introduction of energy parks, on January 30, 1975.

This panel is a little like Rashomon, the Japanese movie where we view the murder from several directions.

Fortunately, I attended, having just come from hearings in Washington on bills in which the nuclear energy center concept had been introduced. It all had a very familiar ring to me, that this energy park proposal was indeed a very serious testing of a national policy of cluster-siting of energy facilities at ever greater magnitudes of scale.

I guess I have a very old-fashioned attitude about information. I think people ought to have it. When I went home with a sore throat and flu, went to bed for a few days, waited for public announcement in the newspapers of the site 25 or 30 miles from my home, and none was forthcoming, I was more than a little puzzled.

I talked to the papers, talked with local government officials, and found that none of them had been informed of the concept. They in turn were a little indignant that they had to learn about so massive a plan for their council of governments, for their county, from a member of a public interest organization, considered I suppose in some circles because of its being antinuclear, as being beyond the pale.

The first public information meeting held at a candidate site was held February 25, at Pine Glen, Pennsylvania, one of the 10 prime candidate sites. It was not organized by state government. It was not organized by local government. It was not organized by the Energy Park Development Group. It was organized by local people and the public interest organization that I represent, which had had a little prior experience with the Atomic Energy Commission and really didn't have a terribly high opinion of that now-defunct agency.

It was at that February 25 meeting that the proposal was made by a member of the public that the agricultural extension service, the cooperative extension service of the state university, be involved; and the invitation for the agricultural extension service to become involved with the county planning agency in presenting public information meetings was subsequently made by a local resident--in a letter which I have with me for documentation.

The initiative in no way came from the State. The initiative in no way came from the Energy Park Development Group, from the utilities. I spent the ensuing 51 weeks traveling about the state of Pennsylvania, in every instance at the request of local people. I was not intruding as an outsider, but coming to them as the word-of-mouth among concerned citizens spread that there was a concept they should know about. As that concern developed over the months, I found I was in fact, as a public interest person paid by no one, spending my own time and my own money, presenting the basic information on this utility concept. While I'm sure Mr. Mulford isn't willing to admit this, at one initial public information meeting, sponsored by a local citizens' group at one of the candidate sites, the local planner stood up at the end of the session and said, "Until the questions began, I didn't really know which side you were on."

We tried honestly to present all sides of this concept for local people, and, most important, to give them the documentation: the energy park study and the Gilbert report. We pressed hard to get that Gilbert report released. One county government was pretty unhappy to find that another county government had received the detailed site information, but they hadn't. We believed all areas deserved to have all available information equally.

Having been the speaker at the Honesdale Audubon Society meeting mentioned by Commissioner Adams from whom the local people first learned that their area was a candidate site some two months or more after the proposal had been announced in Harrisburg, I must say that I do feel that in terms of honestly presenting public information it was the citizens' organization of the state--it was not the state government; it was certainly not the utility--that did the initiating, that attempted to present the documentation. That kind of information had to be spread by the public interest groups, citizens who cared about the environment.

Now, because time is likely to run out for me, I would like to read a couple of paragraphs to you of what I have concluded from having attended many of the input sessions, many of the public information sessions, having participated, having talked with groups of 300, 400 and 500 rural people whose homes were threatened, who were going to lose their farms, who were going to lose their land, their investment, their history, their culture, by the imposition of a concept that they didn't want. They weren't far-out wild-eyed radical kooks. They are the core of our people. They were grossly insulted by the way in which they were being treated. Maybe this is what Professor Ferrar has called the "truth squad" in action. I frankly consider that a rather vicious characterization in his study.

I took to the local residents the NRC nuclear energy center site study information during its formative stage. They had never heard of what was going on before the Nuclear Regulatory Commission in Washington. How would they have access to this information from their local libraries?

We in the Environmental Coalition on Nuclear Power knew about it. We felt that the candidate site residents should understand where this energy park concept fitted into national energy planning. Members of our groups took to them the State "Energy Action Plan" and "Ten Critical Problems" study, which describe energy parks and the necessity of state backing in the planning for implementation of these large, concentrated facilities.

Mr. Harral, Mr. Jacobs, and other staff members of the Energy Council, were in essence, by the state policies developed by the Governor's Energy Council, required to be implementive of such a proposal although they had an officially professed neutrality.

I don't say that to criticize them at all. They had a mandate that was inherent in the state's atomic energy law and which is inherent for the Nuclear Regulatory Commission in the Federal Atomic Energy Act of 1954, as amended, and in the Energy Reorganization Act, Section 207, to promote and to develop as far as practicable, nuclear energy centers. It is policy. Let me read you a few sentences from what I have been writing, to summarize the views of the citizen groups with respect to energy facility siting, and energy parks:

"As these ad hoc public interest groups learned of the nuclear energy center site study and understood the Federal energy policy implications of their adamant stand against this potential exercise of massive Federal authority over their lives, again and again two concepts were repeated. One, nuclear energy centers, or dispersed nuclear reactors as well, created a category of second-class citizenship in which they, the rural population, were being required by their federal government to bear an industrial hazard deemed unacceptable for a high-density urban population. They believed they were thereby deprived of their constitutional guarantee of equal protection under law. Secondly, the principle of distributive justice should be applied. Distributive justice means that those who obtain the benefit also accept the the burden of risk.

"The citizen protest against government as well as industry in this nuclear power controversy must thus be viewed as opposition to, first, the kind of facility being imposed upon them jointly by industry and government, the federal government primarily; second, the size of the enterprise; third, the inequity of imposed risk burden; and, fourth, the denial of individual and community choice in matters of energy supply: how much, what kind, and at what cost to whom?"

The citizens have gone beyond this passe policy, which is the logical direction of growth--endless, mindless growth--and they are in fact attempting to develop regional policies of energy demand and energy utilization, that are acceptable within the context of a willingness to bear the burden of pollution and risk of contamination in the case of nuclear plants, if those are indeed to be built, but a risk that is acceptable to the local community.

In essence, it is a policy of decentralization and deconcentration. Because I think you have been very patient and probably let me extend overtime already, I would only add that it is a policy that needs to be implemented through turning to local areas, allowing local decision making, binding energy referenda, local policy, inclusion of citizens at all levels of government through public interest organizations, and above all, a resolution of the conflict of interest that presently destroys the capability of regulatory agencies at state and national levels to provide what the public wants.

BIOGRAPHY OF SPEAKER

JUDITH H. JOHNSRUD is the chairperson of the Central Pennsylvania Committee on Nuclear Power and co-executive director of the Environmental Coalition on Nuclear Power. SHe is a member of the Governor's Energy Council Advisory Committee. Mrs. Johnsrud has attended Northwestern University and the University of Wisconsin and presently is a candidate for Ph. D. at Pennsylvania State University. She is a former assistant professor of geography at the State University of New York and Pennsylvania State University.

ENERGY PARKS IN PENNSYLVANIA
PANEL PRESENTATION
BY
WILLIAM B. HARRAL
GOVERNOR'S ENERGY COUNCIL

I am delighted to be with you today representing the Governor's Energy Council of the State of Pennsylvania. As Executive Director, I assist the Lieutenant Governor and the Council by providing a staff research function in support of their deliberations. The Council was formed in recognition of the fact that energy supply and use decisions impact on a variety of concerns within the Commonwealth. The Chairman of the Council, Lieutenant Governor Ernest Kline, presides at monthly meetings in order to assure that interested agencies within the state government are informed and coordinated with respect to energy policy issues. These are generally "free wheeling" sessions that permit the heads of various state departments to interact and discuss energy policy options.

Briefly, by way of further background, it is important to appreciate that in addition to my staff, our office is supported by a standing advisory committee of experts from throughout the Commonwealth, and regularly forms and oversees "blue ribbon" task force efforts on specific issues. Moreover, on many occasions we contract with consultants to conduct research activities, and we have continuing contractual arrangements with the Center for the Study of Environmental Policy at Penn State University to operate on a "need-response" basis.

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With this background on the organization and purpose of the Governor's Energy Council, let me briefly discuss the role we played in the energy park investigation. As Mr. Mulford has correctly pointed out, during mid-1973 four Pennsylvania investor owned utility companies (Philadelphia Electric, Pennsylvania Power and Light, Metropolitan Edison and Pennsylvania Electric), which comprise approximately 70 percent of the Commonwealth's generating capacity, began a preliminary investigation of the park concept. Their initial inquiry culminating in March 1974 indicated that there were potentially significant economic, social, political, and environmental benefits to the park concept and they suggested a more detailed study of certain problem areas was in order.

Three months later they formed the Energy Park Development Group to pursue a feasibility study, and identified two task forces to lead that investigation. These task force efforts reinforced the preliminary assessment of the park concept, and ten "candidate" sites were identified within the state.

The Energy Park Development Group, recognizing that a park of the magnitude being contemplated would have significant statewide implications to land use, socioeconomic and environmental issues as well as energy issues, took the initiative of inviting the state government to participate in the next study phase. On January 17, 1975, the Energy Park Development Group presented its preliminary findings to the Governor's Energy Council.

Lieutenant Governor Kline and I, with the Council's endorsement, congratulated the Energy Park Development Group on this initiative. It was apparent to the Council that this was indeed a unique opportunity for state government to work cooperatively with the utilities in the planning and investigation of an innovative siting pattern.

To develop this point a bit further, let me stress that the Lieutenant governor and the Council in general are of the persuasion that energy issues often become crises due to the lack of forethought. Indeed, the Governor's Energy Council was created to coordinate energy programs and assist and encourage the planning for energy development in order to minimize the social and economic upheaval of energy shortfalls. We felt, and I continue to believe, that this opportunity to work with the utilities to investigate an innovative siting pattern was a desirable activity for the Council.

The Council commenced a research investigation into the various facets of this siting alternative. Recognizing that the Energy Park Development Group possessed significant engineering talent for the study of this issue, the role of my office was to assure that some of the broader state interests were not ignored.

In this spirit, my office commenced an "issues analysis" to delineate areas of concern to the State. A series of public education meetings near each candidate site was planned, and they were followed by informal hearings intended to receive an expression of citizen views on this siting concept. In addition to the public input meetings, the Council contracted with the Center for the Study of Environmental Policy at Penn State University to specify a comprehensive set of questions and key issues to be considered by the Council prior to formulation of a State position.

Throughout the spring, summer and early fall of 1975, public education meetings were held. The format for these meetings was intentionally unstructured in order to encourage a maximum of interchange between the participants. There was no attempt to limit or constrain discussion to any particular facet of the energy park concept, but rather to permit and encourage maximum expression of citizen concern.

Following these public education meetings, informal public input meetings were held. Again, the format was designed to encourage maximum citizen expression. At least one member of the Council attended each public input meeting and listened to presentations by various citizen spokesmen. The sessions were tape recorded and written testimony was encouraged.

The citizens were concerned that a growth pattern in Pennsylvania be carefully considered. Their expression of concern for future generations as well as immediate employment and environmental issues were quite manifest. Questions ranging from the international aspects of national energy independence, to the effect of another Arab oil embargo, to the potential for sabotage of nuclear facilities continued to surface. Moreover, significant attention was directed toward the socioeconomic and cultural impacts of energy facility development. Energy conservation and its effect on the growth rate of required energy supplies continually surfaced. In essence, experts from all persuasions utilized these forums as an opportunity to express their concerns to state level decision makers.

Hence, we were successful in developing an understanding of the citizens' sensitivity to various energy supply and demand issues. To what extent we were successful in developing an appreciation of the citizens' views on the "energy park versus dispersed siting alternative" is less clear. Since the open meeting forum was not intended to constrain discussion to that particular topic, the variety of deep concerns of the citizens tended to obscure that issue during the meetings.

Moreover, as surveys have demonstrated, such meetings should only be viewed in decision processes as expressions of the most vocal citizens. That is, such selective citizen input must not be viewed as a barometer of the public's pulse. Indeed, preliminary surveys conducted by Penn State University have indicated that a predominant negative feeling toward the park issue did not exist. However, reviewing the tapes and transcripts from these meetings immediately impresses one of the predominant negative information flow on this concept. Therefore, with respect to energy parks _per se_, it is our belief that we have less citizen preference information than desired from this public participation activity.

At this point I should review where the energy park issue stands today. The Governor's Energy Council on January 23, 1976, formally recognized that the park concept was only one aspect of the general problem of power plant siting. The Council recommended that the state legislature sponsor a comprehensive investigation on the generic issues of energy facility siting, and develop appropriate siting legislation. It was also recommended that the Governor's Science Advisory Committee study in detail the technical aspects of siting power plants of various types and sizes in the Commonwealth. In brief, until the more general issues of energy facility siting are addressed, the Council decided that it was premature to analyze any specific alternatives. Hence, the Council suspended study of the park concept and recommended the more fundamental issues be initially addressed.

The GEC has been accused by various groups and individuals of backing off the issue because of poorly assessed public pressure. While it is true that some unofficial and random polls did indicate that a majority of people in some affected areas were in favor of energy parks, it is true that we did schedule our energy park public meetings in only those areas most directly affected, where a strong majority of negative feeling had to surface.

I'd like to respond to this criticism in two ways--and I'm sure all of you will agree that a governmental entity can conceivably consider decision making at two levels.

First, the list of unresolved issues--not tangential issues, but down-the-middle, bulls-eye issues, issues I will list briefly in a minute--almost mandated a deeper, longer look, particularly a look into legislative involvement including change of old laws, development and passage of brand new laws, and interpretation of existing and potential new laws at the state and Federal levels.

Secondly, it may not be big news to any of you that the Commonwealth of Pennsylvania is a political entity and in politics public opinion is often best not measured in cold numbers alone. In fact, anyone in the political arena who uses a strict numerical interpretation of public opinion is indeed naive.

Perhaps we did not fully assess in advance the weight of negative reaction to the energy park proposal and prepare for it, but the fact remains that the public hearings, while not indicative of the feeling of the public in general, did provide a measure of intensity of the feeling and a measure of the ability to organize the negativeness and its affect on the political system. I would never apologize for making a political decision and it appeared that those in opposition--opposition deeply felt in most cases, and highly organized--could have an effect at the ballot box, perhaps not drastically at the overall state level, but certainly at the local senatorial and assemblyman level. The negative public response was echoed almost unanimously by the affected state senators and representatives and to ignore their desires at that stage in the game could only have been counter-productive to many of our efforts, and quite possibly to the specific effort on energy parks. Maybe that legislative tie-in, at least at the state level, is the most important point I will make.

Some of the generic issues, real issues, currently unresolved and needing legislative attention are: the impact of proposed House and Senate Amendments to the Federal Clean Air Act Amendment which could affect the further development of coal-fired energy parks; the entire issue of the state land-use planning as it affects the issue of siting energy facilities; complete analysis of Federal proposals in facility siting, and the issue of local incentives primarily in the utility taxation field.

In reflecting back over these experiences, I think it is important to recognize that an unstructured meeting is an excellent vehicle or instrument for sensing the breadth of concern of a given citizen group. There is a tendency in such unstructured meetings, however, for groups to offer "panacea solutions" that are in large measure unachievable. Moreover, the activity of "anti-groups" tends to encourage the public to consider these unachievable but consoling options.

The danger in this approach is the fact that we are currently in an energy crisis which tends to be obscured by the presentation of unachievable alternatives. The public becomes impressed with the possibility of solar energy, wind energy, and conservation as a solution to the difficult but immediate problems of energy supply.

Indeed, while it is important to recognize these options and to pursue them with all due vigor, we must be careful that the public not assume that the crisis is over. If energy conservation is to be realized, and if necessary lifestyle changes are to be implemented, then we must not convey the false impression that the energy supply picture is optimistic. It is essential to keep in the public's mind that fossil and nuclear energy facilities will have to be constructed over the coming decades.

Without question, the energy park study and the public interaction that surrounded it was a valuable experience for State decision makers. We are now sensitive to the variety of concerns of our citizens, and I believe the citizens are more informed about the multidimensional aspects of energy policy. The Lieutenant Governor and the Council have demonstrated their willingness to face difficult and complex issues, and to bring those issues directly to the public at the community level.

Anticipating the question as to whether the energy park issue is dead in the state of Pennsylvania or only delayed, let me emphasize that my appraisal of the situation indicates that some generic issues surfaced in this public participation process, and that such issues are now being addressed. I believe the investigations recommended by the Council will provide a sound basis for future deliberations on innovative as well as conventional siting alternatives. I believe the awareness of public concern that we received from these public participation activities will be important in future deliberations at the state and local levels.

In summary, the public participation aspects of the energy park investigation have demonstrated the array of concern the citizens have with respect to energy siting, and they surfaced some general issues that require attention prior to the further investigation of any specific siting pattern.

BIOGRAPHY OF SPEAKER

WILLIAM B. HARRAL has been the Executive Director of the Pennsylvania Governor's Energy Council since its inception in February, 1974. Mr. Harral attended Pennsylvania State University and received a master's in government administration from the Wharton School at the University of Pennsylvania. He has held city management posts in Pennsylvania and California. For the past 15 years he has represented Pennsylvania local governments in the State legislature.

DISCUSSION

MS. HOWARD: Elizabeth Howard, Tennesee Valley Authority. I have a question for Mr. Mulford. You mentioned that there was an unfortunate choice of siting considerations in locating your candidate sites, and Gilbert had emphasized things like engineering constraints such as water availability and some safety considerations like population density, rather than some socioeconomic considerations. My question is, if you had to do it again, how would you arrive at realistic siting considerations which would include citizen interest as well as your technical expertise from your engineers or ecologists other than by trial and error? To rephrase it, have you developed a siting methodology which actually includes public input for evaluating siting considerations prior to candidate site selection?

MR. MULFORD: To be honest with you, we really haven't developed anything new. When the study was suspended in January, we ceased work on it. We have, of course, discussed it; as I mentioned, we had our self-evaluation. In my presentation, I didn't present what the criteria were that we did look to for the siting of these parks. We looked at topography, railroad and road access, acceptable atmospheric conditions, compatible land use, and minimum ecological disturbance, and didn't take into account some of the factors I mentioned, the economic well-being of the

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community, for instance. This is one area I think we were grossly negligent in not considering, the unemployment situation, how best we could improve the area. Not where was the best site as far as all these factors I have just listed, but could we take an area, say, that had lost its former utility, was an eyesore, like an abandoned strip mine, and make something worthwhile and beneficial and a credit to the community. These are the kinds of things that we should have done; and as well, perhaps, we as a group of utilities, were dilatory in not going to the public sooner. I mentioned that earlier too. We recognize that that perhaps was a major mistake, not going to the public at the outset rather than halfway through our studies. When you come out with half-baked information, incomplete information, all it does is confuse and frustrate. That certainly was the case here.

MS. JOHNSRUD: I believe it was stated earlier that one of the northwest areas of the state was favorable to the energy park concept. I think it should also be clarified, however, that that area was scheduled for a public input meeting to which construction union people, understanding that only one plant was involved, came favoring the concept. That meeting was held, however, prior to any of the public information meetings scheduled through the Cooperative Extension Service of the University. At the second input meeting, after the information had been presented to the public, I believe Mr. Harral can confirm, there was strong opposition expressed by those who would be affected.

I will shock my environmentalist friends by saying I think the best thing we could do in the United States is to propose a massive energy park in every single county of the nation, and people would begin to understand where their gluttonous appetite for energy is really taking them.

SEABROOK
NUCLEAR STATION

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SEABROOK NUCLEAR STATION
PANEL PRESENTATION

BY

ANTHONY Z. ROISMAN

ROISMAN, KESSLER & CASHDAN

The Seabrook plant is an interesting case study because unlike many of the antinuclear programs that have been launched by organizations such as the New England Coalition, which was my client in that case, this one was not an antinuclear attack at all. We specifically designed the case in the Seabrook case to be an attack on that plant at that site at this time. And we deliberately avoided raising issues which we thought were essentially generic, questions which affected the acceptability of [any] nuclear power plant at a particular time. The fact that the case was presented more by a direct affirmative case from the intervenors rather than a lengthy cross-examination is also somewhat unique in the experience of nuclear power plants. As I will discuss later, I think that is a uniqueness which is a product of a system that is perpetuated by the current Nuclear Regulatory Commission rather than an inherent problem with public participation in the licencing process.

The issues which were singled out in that case began to be formulated in the state proceedings, which preceded the Nuclear Regulatory Commission hearings by a couple of years. I should explain that actually the Seabrook plant was in the public eye once before, because Public Service Company of New Hampshire had at an earlier time proposed to build a nuclear power plant in New Hampshire,

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but it later abandoned that because of financial problems and, I guess, a concern with putting a nuclear plant in New Hampshire in those days.

So what we had was sort of an old idea that was to some extent brought up to date. In the state proceedings, the state had its first hearing under a site evaluation committee, which was an attempt to put together in one state proceeding all of the relevant state licensing authority. I won't dwell long on the state proceeding except to say that it lacked very much sophistication in the sense that the hearing board was not made up of people who had any skill in administrative proceedings. So although it purported to be an adjudicatory hearing process, a number of the issues which were later debated before the Nuclear Regulatory Commission were never actually developed in the state proceeding simply because the hearing record was not allowed to be developed in that manner.

One important thing did come out of the state hearing, although I suspect that the company will claim that it was not a result of the hearing at all, and that is that in the original plan for the plant at the site, two long tunnels, which were designed to bring water from the ocean to the plant and to take it back to the ocean, were scheduled to run through a salt marsh. The plant sits on a promontory that sticks into that salt marsh, and that salt marsh is an important environmental feature. During the course of the hearings an extensive attack was made by the Seacoast Antipollution League, through its experts, on what the impact would be on the salt marsh of running these tunnels through it. On the last day of the hearing, the applicant announced that it had modified its plans and rather than run the pipes through the marsh, would run the pipes under the marsh by drilling beneath the marsh and at no time presumably disturbing the marsh itself. That change removed, to a large extent, one of the major environmental detriments that the plant had. I believe the change was made by the applicant because it realized that it was very vulnerable on that particular issue, a realization that the citizen groups involved and the State Attorney General's Office made a big point in the course of the hearing.

The applicants however, did not have their license simply because they had the state approval, and I will discuss in a moment why I think that is a regrettable situation from their standpoint. Nevertheless, they then had to cross another river, which was the Nuclear Regulatory Commission. That hearing which was conducted by the Nuclear Regulatory Commission had all of the trappings of your normal adjudicatory hearing. The issues which evolved there, some of which had also been discussed in the hearing before the state, involved the financial qualifications of the lead applicant, Public Service Company of New Hampshire, and seismic problems at the site that became even more acute with the applicant's suggestion that it would now tunnel under the marsh, therefore having its main sources of water dependent upon the security of the rocks through which these tunnels were to run.

The problems of evacuation and population concentration in the area--the plant is located only a mile and a half from New Hampshire's only real public beach, a beach which, on heavy populated days in the summer, can have 50 to 75,000 people in the immediate vicinity of the plant--became a major issue. In addition, the environmental problems associated with drawing water from and discharging it into the water that was immediately outside the harbor where this plant is located were a major issue because of the ability of that plant to draw in the larvae of both clams and lobsters, important food shellfish in that area.

Alternative energy sources were stressed and a special study was conducted by the environmental studies program at Dartmouth College into the availability of options that might be used if more energy was needed in New England, other than going to a nuclear plant. Those options included things which could be implemented within the time scale that the Seabrook plant was needed.

In addition, a case was presented on behalf of the New England Coalition with regard to the modification in existing building structures and in new planned buildings in New England to conserve energy that would otherwise be wasted and to therefore obviate the need for Seabrook.

Finally, a case was made during a reopened portion of the hearing on the need for the facility at all. Had the applicants developed an adequate case for this plant? Was there really a need in New England for power? Probably the most significant factor was that for the three years immediately preceding this discussion of the issue, New England had had essentially no growth in electric energy. It had been a flat growth in energy for that period. That had not been predicted when the plant had orginally been planned, although the plant and its scheduled completion dates were essentially unchanged as a result of those changes in energy use.

The issues are not unique to Seabrook. Many of them could be raised with respect to to other plants in some variation, and for that reason I am not going to dwell too much on the merits of the issue.

But let's take a look at what I think Seabrook is indicative of.

From the standpoint of an applicant, Seabrook is indicative of the fact that the current process by which we make decisions about how to license facilities is confused, is duplicative, is unnecessarily complicated and, from their standpoint, unreasonably long. If I represented utilities, I think I would consider priority number one, establishing a mechanism in this country by which energy decisions could be made on a timely, efficient basis. This plant still, although it has the approval of the Nuclear Regulatory Commission, is not yet approved. It is still waiting for the Environmental Protection Agency to pass upon whether it is entitled to get a permit to be excused from cooling tower requirements for the facility. In addition, it still has the Corps of Engineers' permits to go through. In addition, it still has the appellate process related to the Nuclear Regulatory Commission proceeding.

In short, despite many years of effort, today the Public Service of New Hampshire should reasonably not conclude that it has this plant locked up. There are a lot of hurdles still left to go over. I don't believe there should be that many hurdles. It doesn't mean the Public Service Company of New Hampshire doesn't have to take a great deal of the blame for the problem, because utilizing the existing process, which allows the company to plan for, design, pick the site, order the equipment start the early studies, and begin some of the site borings to determine whether this is a good site with absolutely no public participation, encourages those of the citizens who are concerned about such a plant to raise every conceivable roadblock when at the eleventh hour they are advised, "We have a surprise for you. We are going to put a nuclear power plant at this site at this time and we need it immediately; if we don't start the day after tomorrow, the whole country will crumble."

Now, the problem with that kind of process is obvious. The utility has an obligation, if it wants something that much, to come to the citizens when it begins to think about it. If you put it in the context of family planning, we normally consider that before the family conceives the child, both partners have talked about it a little bit. The conception of a nuclear power plant is done completely on the part of only one partner and the citizens, later, to use the euphemism, are "screwed." They are simply told, "You are going to give birth to this power plant which you will pay for, which you will live with, and which you will like." That, I think, is a basic problem with the system.

If you were to really talk about how to reform the system you would have to go back to square one. You would have to go back to what is it you need to have citizens involved in from the very beginning. And I think you start with the day on which a utility first begins to make long-term energy projections for regions. And at that point, you say "We are going to have a public hearing, and we are going to involve the citizens and states and governmental entities that have an interest in this, and we are going to decide what should our region be, should we be a high growth region or low growth? Should we grow electrically with on-site facilities, or central generating facilities?" And you say that so far in advance, as a good utility would do it in-house, that everybody is aware that the decisions they make now are going to have to bind them in the future. Then you know that you have already decided, long before you have to begin construction of a facility at a particular site, that you do need a central generating facility of a certain size by a certain time. And take that issue out of the hearings from then on. Don't debate that issue any more.

If somebody finds some really remarkable new piece of evidence, which they believe would have an impact on a previously made decision, sure, you would bring that forward--some major breakthrough in energy sources, some major change in energy consumption in the region. But basically put that decision aside and quit arguing about it.

We argued a lot in the Seabrook hearing before the Nuclear Regulatory Commission, before the state agency, about the fact that you didn't need Seabrook, but we were looking at what was only six or seven years from the date on which the utility told us we absolutely had to have it. And the biggest hurdle we had was to be able to persuade people that you could really implement some alternative in the interim.

I am firmly convinced that energy conservation in New England would obviate the need for Seabrook, Montague, Sears Point and any of the other reactors that are now planned for New England over the next 10 or 15 years, but I am equally aware of the fact that if I could have made that argument 10 years ago about those reactors I would have had a much greater chance of persuading a decision maker than when making it in the eleventh hour. But the blame for putting my argument, and the argument of the citizens that I represented, into the eleventh hour is not ours. The first time we had the chance to speak was at the eleventh hour. We did what we had to do under the circumstances. We could go through other examples.

The site selection process is held closely by the utility and sometimes, in some parts of the country, with some cooperation with the public utilities commission of the state. Some early siting selection is done but not nearly enough to make an effective useful citizen input from the outset.

Let me be very clear. I believe that that input has got to be adjudicatory. I think it has to be citizens with the right to cross-examine, with all of the lawyer tactics that we sometimes deplore in some situations, because I think these kinds of issues need that type of thorough airing.

And you pay a price for the adjudicatory process. It is slower, it is more cumbersome than a dictator simply telling you, this is what I have decided, or a legislative hearing where you let people get up and they say their piece and everybody sits down and nobody knows whether one person had a good set of premises for what he has concluded and they make a decision on it. Yes, it is less efficient. A democracy is less efficient than communism but that is what we have, and putting the citizens into the process involves spending the time.

But you've got the time. Utilities take years thinking about these projects. The citizens want to get in when it first starts. There is plenty of time for lengthy hearings, for long discovery, for cross-examination, for reargument, for reopening hearings, if you start early enough. So that was problem number one in Seabrook.

What you do if you do that kind of process is you pick off the issues when they can be picked off, at the earliest possible date, and lay them to rest so that a utility does not do what Public Service Company of New Hampshire was forced to do here. It argued about the need for the Seabrook plant before the Nuclear Regulatory Commission, arguably it can come up even in front of EPA because there is a certain amount of balancing that goes on between the cost and benefits; and conceivably, because the Corps of Engineers is doing an impact statement, it can argue about it again. Damn it, that's not right to them. But it is equally unfair to us to tell us we can only argue about it when it is too late to do anything else. So take the issues, deal with them at the earliest date you can, and lay them aside.

What that means is that when you get very close to the date on which you want to begin construction, you are talking about only those issues which remain that you really couldn't have talked about before. Only the last issues. Only the latest issues. But there is a price that has to be paid for that kind of organization as well. That kind of a process is only going to work and is only going to be acceptable to my clients and to citizens in general if you get your one bite at the apple and you really get to bite.

We weren't even allowed to nibble at the apple in the Seabrook case. The reason was that the resources which my clients and the other citizens' groups had to put into that case were an infinitesimal fraction of the resources that the utility spent on only one phase of the case. And you simply cannot talk about equal justice or a fair hearing or equal protection or anything else if you have a process in which one group is armed with the resources and another is not.

Let me be clear. I am not suggesting to you that the client that I represented, the New England Coalition, was representative of all the citizens of New England. They were representative of precisely the citizens they said they were represetative of. They had a position. Their position was they didn't want that plant for a certain group of reasons. There are other citizens in New England who thought that plant was the best thing to come along, and they wanted it right away. We didn't represent them. We didn't purport to represent them. We don't think we are entitled to financial assistance because they needed to be represented.

We were entitled to financial assistance, because unlike the applicant and unlike the Nuclear Regulatory Commission staff, we had no guaranteed source of funds.

When I stood up and made a motion in the Seabrook hearing, my clients paid in their rates for my opponent to get paid to oppose me. When I said something against the Nuclear Regulatory Commission staff, my taxes that year reflected my payment to them for their answer. I say that process is not fair if it is not equally available to my clients to have the resources to pay me and to pay the experts that we need to make the case.

There is only one public interest factor involved in these cases--to come up with the best approximation of the correct answer. The best approximation of the correct answer, we are told by the judicial system in this country, is to pit the best cases for, and the best cases against, against each other, and from that to have a fair and impartial judge select what appears to him to be the correct answer. That does not produce truth. That produces validity. It produces a system in which people can believe that the decision was fair.

There is nothing fair about the decision that has occurred in the Seabrook case. It was not David and Goliath, because we had nothing even approximating a slingshot or the rock. It was much more Goliath and nobody. Goliath by himself on the field of battle.

In that process, the citizens are squeezed out and the cost of putting them in is a fraction of the cost of leaving them out. Number one, we were able to effectively argue in that case, and we have argued in other cases, that because we were underfunded, we needed more time to prepare our case than everybody else did. And we were given some leeway--not as much as we thought we needed but more than an applicant would have needed with their resources in our position. We were able to take time conducting cross-examination of witnesses because we did not have a witness to say affirmatively what we wanted to say, so we had to put somebody's other witness on the stand and try to get them to say, because they were an expert, what it was we wanted to hear.

That is a very time-consuming process, also extremely frustrating, because usually the witness does everything within his power to not say what it is you want him to say. Sometimes that tends to discredit the witness and make him look stupid. You ask him, "Is the sun shining today?" and he thinks, "Hey, that is an intervenor lawyer asking me that question; there must be an ulterior motive." He will say, "The blinds are closed; I can't tell from here," or, "I didn't look when I came in the room this morning." Everything to avoid answering the question.

That is a stupid way to conduct a hearing; what you want is to have your own witness get up and say, "When I walked in this morning, I took a look up in the sky and the sun was shining," and that is a lot quicker than having the other lawyer say, "Objection, question out of order--not relevant--didn't phrase it right," and all the gobbledygook you have all heard if you have ever been to one of those hearings.

Direct testimony is a much more effective way of making your case. You don't need to spend years of discovery trying to get the facts from the applicant or the staff. You can take your experts and send them down to the public document rooms, to the libraries, to the research facilities in the country and say, "Find the evidence. Find the case. Come back to us, give us what is available; we will make the case on the basis of that."

You can't do that when you don't have the money. The result is, you end up with a very unfair process.

Seabrook is probably the classic example of what the final result of that is. Conceivably today, certainly in many days over the last couple of months, citizens in New England who have felt that the Seabrook decision was not fair have laid their bodies on the line, have gone on the site, have trespassed on the site, have violated orders of judges, have been sent to jail, are sitting in jail today, because they did not feel that they had a fair hearing before that hearing board, because they do not feel that the decision which was reached was defensible, was fair to them.

I don't want to be over-dramatic about it, but every revolution that has ever occurred in any country has started with just such a handful of citizens going to jail, because they thought that what had happened was not fair.

And the only thing that holds this whole thing together, the only thing that keeps lawyers in business, is the assumption that there is a fair process and a way for the lawyer to make his case, and for the client, having had the case made, to say, "Okay, we lost today, but we had a fair bite at the apple and we will come back another day and we will take another chance."

My client didn't have a fair bite at the apple and I feel guilty when I tell them, "Don't go to the site; don't lie down in front of the bulldozers; don't go to jail. We have still got to go through the process. We have still got to go to the appellate board. We have still got to go to court if that doesn't work," because I can't tell them that that process is really going to be fair to them; because what I also have to tell them is, "It is going to take this many thousands of dollars to make a really good brief on appeal, and I can't live without it. And you can't find it. And we may not be able to make our best case on appeal." When I tell them that, and I put myself in their position, my answer is, "Damn it, let's go blow up this site. Let's go do something that will really dramatize what is happening to us. Let's vent our frustration on the people whom we feel the greatest frustration against."

My client and other citizen groups have gone to where we think the legal processes allow us to go to get help. We have gone to

Congress and sought legislation. The Senate passed a bill that would have provided for citizen funding before the Nuclear Regulatory Commission. It died in conference when the ERDA bill was passed. We have gone to the Nuclear Regulatory Commission innumerable times, asking them to act on a request to establish procedures for financial assistance.

That agency that considers itself bound to find an interim something for every single nuclear power plant, hasn't found an interim financial provision for intervenors that come to it and say, "We are against the wall. We have a case to make and we can't make it." That agency by itself has done more to undermine the credibility of nuclear power than any other single entity in this country. And it does it every day that it sits on requests from citizens to whom it says, "We are still thinking about it." If it had thought only half that long about some of the safety problems which it has dealt with on an interim basis, most plants wouldn't be running today, because they would still be under study.

And that is an agency that has been told by the GAO it has the authority to give this money; it has been told by the Senate of the United States it should give the money; it has been told by the Congress of the United States that it has no bar to giving this money; it has been told by Ebbins and Kasper that the citizen groups are without the funds; it has been told by innumerable citizen groups it should give the money; and it has been told by the moderator when he was Chairman of the Administrative Conference that it was a good idea for Federal agencies to give funds to intervenors to participate in licensing processes for the very reasons I have indicated to you today. Still, they don't do anything. I say that because the General Counsel is sitting here today, and in the discussion period don't ask me why they haven't done it, ask him. I would like to know the answer to that question, too. I have a letter in my file that says, "We will not decide that question at this time. It is still under study."

By the way, that agency contracted to have a study performed of that whole question. The study, which was completed over a year ago, is still sitting in the agency and there is still no action.

In sum, I think we have got two problems and I think they could be solved simultaneously. Those people who want to build more power facilities are being forced to run around and around and around and around to get the authority to do it, and that is wrong. Some place, somewhere in this country, there is a need to build more power, and while I personally hope it will never be nuclear, nonetheless I know it will have to happen. Some kind of power has got to be built, and the people who are in the business of building it need to have a reasonable mechanism for doing it, and those of us who feel that some of the things they want to do are wrong need to have a reasonable mechanism for making our case.

Now, there is a simple solution; that solution is for those two groups of people to jointly go to the Congress of the United States and say "Give us a package. Simplify these processes so the decisions can be made on a timely basis. And equalize the ability of both sides to participate."

If that had happened, I can't tell you that I am confident that Seabrook would not have been licensed. But I am confident that no one would be in jail today if it had been licensed.

BIOGRAPHY OF SPEAKER

ANTHONY Z. ROISMAN earned his AB degree at Dartmouth and his LLB at Harvard Law School. After serving in the tax department of the Department of Justice he entered private practice. Since 1969 he has been a member of the firm of Berlin, Roisman, & Kessler, now Roisman, Kessler and Cashdan, and he has specialized exclusively in representing conservationists, consumers, civil liberty and poverty interests. His clients include the Environmental Defense Fund, the Union of Concerned Scientists, the Sierra Club, and many other environmental groups.

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PANEL PRESENTATION
BY
THOMAS G. DIGNAN
ROPES & GRAY

I think I would like to start off, coming off the springboard of the question of public financing of the so-called public interest group. To put it bluntly, I am against it and I have three reasons that I would like to discuss with you. First, in my judgment, it will further facilitate and entrench the use of the adversary adjudicatory hearing in nuclear licensing, a process which I believe should be done away with totally. Secondly, it will permit the use of public funds to further the point of view of what I, at least, think are private interests, and quite possibly permit such a situation at a time when the private interests can afford to do it themselves. Finally, I guess basically I just believe, the last thing the country needs is another amendment to the Lawyers Relief Act.

Now, starting with my first reason, that I think the adversary process, if anything, should be done away with, I think that the present hearing process is the only true nuclear disaster we have ever had in this country. The purpose of the adversary system, as conceived by the common law judges of England and indeed before that, was to handle disputes between people. We all know that on this earth any major political dispute is still handled by killing people, witness World War II, Korea, Viet Nam. On the other hand, we decided

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long ago that in civilized society, you handle disputes within the society by some sort of legal system or another. This is more acceptable than just giving the two contending adversaries a bat and letting them settle it in the back of the room.

We adopted in this country from England the so-called adversary system of justice and I agree with Mr. Roisman, it is not designed to reach truth, capital T; it is designed to reach an acceptable result on which society will then proceed. A very fine professor I had in law school once said the whole basis of the jury system is to lock 12 people in a room and let them decide the undecidable and then let them come out and give their verdict. They never have to explain it to anybody, and this is a good way to work, because if they had to explain it, they probably couldn't.

I think the system should be done away with in nuclear regulatory hearings and not because the issues are technical. The adversary system long ago adapted to handling technical issues through the aegis of the expert witness and other things. I think it should be done away with because the adversary system has as its basic premise the concept that a question will be put to the trier of fact, whether it be jury or judge, which question is susceptible of a yes or no answer. The question is, "Did Smith kill Jones in a murder trial?" "Was Smith negligent in an automobile accident case?" "Did Jones break a contract in a contract case?" And the jury or the judge can come up with a yes or no. This is not to say it will always be the right answer, but the question is susceptible of a yes or no.

The questions in an NRC hearing are not suceptible of yes's and no's. The basic question asked on the so-called safety side of the hearing is, is it safe enough. Now, the only person I know of who can say "safe" and mean it is an umpire in a baseball game. Anything can be made more safe. You can put two extra engines on the airplane, you can put another pilot in the cockpit. No amount of advocacy, cross-examination, cute legal tactics or anything else is going to break a witness in an NRC hearing because he is going to say, "It is my judgment that this is not safe enough," and you can't disprove that. Everything can be made more safe. What we are really always asking is, when is the extra expense of another piece of hardware so great that the return in safety you get is not commensurate with the cost of putting it in. It is a judgment call. Judgment calls are not what the adversary system was set up to make. Thus, I suggest that the system we are using just isn't fitted to the task.

Reason number two. I indicated that in my view, the so-called public interest group is representing a private interest. I think it is fair to say, and I am perfectly willing to be corrected by anyone who wants to throw in another category, that there are basically three kinds of opposition you run into in nuclear licensing cases. One is the straight antinuclear opposition, no nuclear plants. The second is, "Well, I am not against nuclear power, but I don't want it here." And now the NRC, in its infinite wisdom, has decided the Greenwood case and we can now have a group that is unhappy with the transmission lines and that lost in the state hearing. They now can come in to the NRC and announce they would like to have another crack at keeping the transmission skunk out of their lawn party in the NRC hearing. I don't know whether anyone has really explored what that does for "standing" because it's no longer anybody within 40 miles of the reactor, it's anybody who has a transmission line slated for his back yard. I don't see why the public Treasury should fund this, frankly. These are private interests. People look at the utility as representing a private interest, which it clearly does, but these individuals are also pushing a private point of view. They are entitled to hold that point of view. I agree with Voltaire: "I don't agree with what you say, but I will defend to the death your right to say it," but it doesn't mean that the public Treasury has to pay for them to put the view forward.

More importantly, if the public funding I have heard talked about, to wit, set up a fund, line up the intervenors and divide the fund, is utilized, we run into a situation whereby, I suggest to you, the Kennedy family and the Rockefeller family could get together, form a group called "Citizens for (Something or Another)," run it on a zero balance sheet and walk in and ask the public Treasury to kindly fund their intervention on a power plant case. That is wrong. I think if we are going to fund intervenors, we should force the revelation of the tax returns of the members. This would enable us to find out if the local citizens' group that doesn't want this plant is really a group of indigents, or contains some people perfectly able financially to protect their interests. I don't think the public Treasury should be used other than as we traditionally have used it in this country, to help out the truly indigent.

Reason number three, I don't want to see another amendment to the Lawyers' Relief Act. I am a lawyer. I am very pround of it. But I will tell you something; lawyers are taking over this country. And I really question the wisdom of that.

An engineering friend of mine once defined a lawyer this way: He said, "You give a lawyer a lever long enough and a fulcrum high enough and the lawyer will break the lever." Now, that is true, Trial lawyers are tacticians. Anybody who has the misguided idea that a trial lawyer walks into a courtroom to search for truth, let me disabuse you of that right now. A lawyer walks into a courtroom for a reason. He took an oath as a young man that hopefully he believes in deeply; I know I do. It is to represent your clients within the bounds of the canons. Now, the canons mean a lot. You don't put on perjured testimony; you don't play fast and loose with the rules of common decency. But at the same time, you are not particularly interested in seeing to it that the other side gets well represented or that everything that favors them comes out if they don't know it is there. You are in there to win. And I am proud of that, too, and I am proud of it for this reason: when lawyers become judge and jury, the whole adversary system breaks down. The theory of the system is that two people come in and contend and we get truth out of the dialectic that then occurs. I think you ought to understand what a lawyer's function is. He's got a case. He's drawn a hand and he is going to fight for it. He is not in there in some quasi judicial or Congressional role.

I think what's happened to this industry is that we have gone all the way in this country with my favorite definition, at least, of the law. Some wag once said that the law is common sense as modified by the legislature. Now, we have done it. The name of the game now is public hearings at every opportunity. Well, Mr. Justice Holmes many years ago in the Bimetallic Case said he didn't really see where the Constitution required every decision to be made in a committee of the whole; and I think he was right. Decisions have to be made. You may not agree with them, but I really don't see why every single power plant has to be subjected to three or four adversary hearings. I see no reason why the legislative format can't do it.

I think the Commission is, because of this trend toward lawyers, going the way of the Internal Revenue Service. If any of you do have a fortunate situation where you have a large tax return to file, you know that the first thing you do is call your tax lawyer. Nobody can file a tax return on their own anymore unless they can use the short form. I don't think you ought to let the lawyers take over this industry or the country; and the more of these Lawyers' Relief Acts that you pass, the more power you are going to hand to the bar. The bar is a proud and good institution, but I don't think trial lawyers are fit to make all the decisions in this country, and I happen to be a trial lawyer.

Now, I would like to say a couple of things that really don't come off this funding thing that my friend Tony brought up. Tony's argument that we ought to get the public in early is a darn good one. The problem with it is, try to get them in. Tony's quite right. These decisions are made over a long term in a board room.

Now, let me explain a) one of my prejudices; and b) where my knowledge comes from. I am worse than what you might think from the finger pointing. I grew up in the electric industry. My father was an electric utility executive. Some of my close friends maintain that the first words I ever learned to speak were "business managed, tax paying, electric light and power companies of the United States."

But having seen it up close, I am aware that the executive has one problem. He sits in his big, plush corner office and he has to have power on the line when people want it. He has to use his best judgment how to get it there. If any of these utilities announced that 25 years from now we are going to build a nuclear power plant, I will guarantee you nobody is going to show up to get in the process. Nobody gets in the process unless, as Tony indicates, the imminent birth is announced, and then they are hit from all sides. If it is an election year in New England, you are hit from three sides. So I don't think it is fair to indict the industry. They have a job to do and if the lights aren't there, no one in an environmental group is going to get blamed for the power not going on. No one will get blamed up at the State House. They will point the finger one place: at the Chief Executive of that electric company; and that's his problem.

Now we have heard a lot about the AEC and now the present NRC and the lousy job they are doing. I have to admit I occasionally have joined in on that view. Let me say one thing about the AEC. Whether anybody likes to admit it or not, this agency was created in 1954 and given a duty, and its duty was to see that the public was not injured as a result of the commercial exploitation of the atom. They batted 1,000 on that charge. There isn't another alphabet agency in this country that has done that. The Federal Drug Administration are those wonderful people that brought you thalidomide; the Securities & Exchange Commission, pick up the Wall Street Journal any day: somebody got defrauded on a stock deal; the Federal Trade Commission, they are trying to make progress. This agency, whether anybody wants to admit it or not, is batting 1,000. If you want to argue that may not go on, and if you want to argue that the accident is coming, that is fine. But at least give them some credit for a job done pretty well at this point.

BIOGRAPHY OF SPEAKER

THOMAS G. DIGNAN is a member of the law firm of Ropes & Gray. He took his undergraduate education at Yale, and his JD at the University of Michigan Law School, with distinction. He has been with the Ropes & Gray firm since 1964. He has served as special assistant to the Attorney General of the Commonwealth of Massachusetts from 1974 to 1976.

SEABROOK NUCLEAR STATION
PANEL PRESENTATION

BY
DONALD W. STEVER, JR.
NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE

I must say, for about six years I have been sitting in hearing rooms playing third man on the dog-and-pony show of Roisman and Dignan, and I am still doing it, and I think I will be doing it for a long time to come, from the sound of things. Tom has often complained that I end up being the clean-up man and he gets wedged in between Tony and me. I don't know if he is a thorn between two roses or a rose between two thorns, but, anyway, we seem to be there again.

In any event, I do have some thoughts generally that I must admit have sprung from Tom's statements. I also have some thoughts about the process that went on in Seabrook.

Tom's position is that what you have to do is eliminate public participation; eliminate the public from the process; and leave the decisions to some experts somewhere out of public view, and devoid of public accountability. That is not the democratic process. It is not a reasonable position for another reason, and that is that it assumes the relationship between the regulator and the regulated will be something that it has never been in about a hundred years of government regulation of large industry--an arms-length relationship. It would also require, in my view, firing the entire present NRC staff, whose attitudes seem inextricably wedded to the utility and vendor interests, and whose attitudes seem to be, at least as I have seen them in the hearing process, antithetical to arm's-length regulation. His position also assumes that the economic incentives that tend to sway engineering experts would be balanced, that is to say the industry-oriented economic rewards that tend to sway their opinions would be balanced, and they are not. The money flows from only one segment of the economy, not from balanced segments of the economy.

Regarding the use of the adversary system, Tom's position assumes there are no disputes in nuclear licensing. Now, if there are no disputes, then I don't know what I was listening to for 11,000 pages of Seabrook transcript. They sure seemed like disputes to me; they seemed like disputes of material issues of fact, such as, should one count 50,000 transients as a whole person or as an eighth of a person for purposes of establishing the population center distance which, under an applicable rule, establishes the extent of engineering safeguards for a plant. You can answer that question yes or no, and there is an issue of fact to be adjudicated. Another one, how many fish are going to be killed by a facility if it has a once-through system in a certain location, and is that number acceptable, that's another issue of fact. Do we require the evacuation of transients from a nearby beach, and how long will it take to get them out of there? What are the factors that go into such a determination? These are all matters that contain at least a measure of factual dispute. Does the applicant utility have the financial wherewithal to operate the facility safely once it is built, or to backfit if it has to be backfitted if the initial decision turns out to be wrong?

And finally, I think, contrary to Tom's opinion, lawyers don't make the decisions. As I have heard Tom say many times when being beset upon by an enraged member of the public, lawyers are only hired guns. They don't make the decisions. The input has to come from somewhere else.

So, having vented my philosophical ire a little bit, I want to tell about the Seabrook process. One thing I think that we on the podium are all in agreement with is that the Seabrook process was a travesty. It didn't work. Whether or not the decision on any of the issues is correct is really not the issue. The process itself simply was too long; it was too full of emotion; it was simply a cumbersome, unwieldy process that has resulted, as Tony says, in a lot of unpleasantness.

If we are really to discuss this process completely, the NRC staff ought to be here on the panel. I thought the staff was going to be on the panel, but it isn't here. Frankly, I don't know why the staff isn't here, and its absence seems oddly significant. But that tells us something very important about the way the NRC seems to function. That is, that there is an outwardly open process, but a lot of the decisions are not made in the open. The Seabrook case is a prime example of that. The staff is a party in the licensing proceedings, but the first decisions that are made, essentially the primal decisions as to whether or not to go forward with the plant, are made by the staff without provision for meaningful public input. It acts as a judge. That judge then turns into a party and tries to convince another judge, the Licensing Board, that indeed its decision was correct. I have read many Appeal Board decisions and many Licensing Board decisions in which the staff's views were accorded great weight. Where is the public input in the staff decision? It is nonexistent.

In the paper that was written on Seabrook, Mr. Spencer talks about that very briefly and he says, with regard to ACRS sessions, that efforts by interested parties have resulted in some of the ACRS sessions being open to public participation.

Well, staff meetings with applicants prior to docketing and the convening of the Licensing Board and the opening of the hearings are not subject to public participation. In some cases, the public is invited to "observe." Potential intervenors, once the license application has been filed and the case docketed and people have intervened, are invited to meetings between the staff and the applicant. Now, those meetings occur before the Safety Analysis Report is issued; they occur before the Draft Environmental Statement is issued; they are always held in Washington. Even if invited to participate, there would be little opportunity for intervenors to have an impact. Where are they going to get the money to go to Washington?

The State of New Hampshire didn't have the money to go to any meetings but one. We went to a meeting at Oak Ridge to try to find out the reasons why some conclusions were made in the staff's Draft Environmental Statement, and also why the Final Environmental Statement was issued at a point which we thought somewhat premature in the proceedings. We couldn't find out. We met with the consultants at Oak Ridge, but the staff was ever-present. The staff lawyers sat in on the meetings riding herd over the experts to make sure they didn't say anything the staff lawyers didn't want them to say.

There is really no public participation at the formative stages of Federal decision making in this particular regulatory process. Now, that has two effects. One, it has the effect that Tony Roisman told you about. The other effect it has is that once a case is docketed, and public participation becomes available, intervenors have to scramble around to try to make a case and evaluate the correctness of staff determinations on a list of issues very quickly. In a relatively short period of time, a case must be outlined and decisions reviewed that have been made over perhaps a year or a year and a half as a result of ex parte communication between the staff and the utility applicant. So the intervenors are automatically saddled with a disadvantage. Not only do they have to put a case together, but they have to make their contentions within the short time period permitted by the rules of practice. (This is probably the reason for the rule that was talked about much earlier today, that the contentions don't have to be very specific and you don't have to really make very detailed contentions.)

But, in terms of the process, it makes it incredibly longer than it would otherwise be, because if the intervenors were involved in that negotiating process, if the public were invited to attend that process and be a part of what goes on between the staff and the applicants, they would formulate their positions more intelligently, and positions that aren't necessarily founded in fact could be weeded out, and good, well-thought-out positions could be formulated before the convening of the Licensing Board, thereby eliminating often protracted discovery periods.

In Seabrook, for example, we had almost a year of discovery. The discovery wasn't altogether meaningful, because the discovery was in great measure consumed by very basic questions that should not have had to be asked. Discovery in these cases, by the way, also is the product of intervenor lawyers who don't have money to hire experts to tell them what they should ask and what they shouldn't ask. They end up asking seven times the number of questions they ought to ask to find out the answers that they need to know, in order to know whether they have to take a position on an issue, or not. So you end up with discovery proceedings that are incredibly long and often not terribly productive.

This unreasonably lengthens the hearing process because, again, if the public were involved at the early stages, a lot of the pure baloney issues that seem to creep into the licensing proceedings wouldn't be there. I have been through two full-blown licensing proceedings, and believe me, there are a lot of issues in them that shouldn't be there, and yet, the reason they are there isn't the intervenors' fault or the utilities' fault. It is the fault of the process, because the public just doesn't get involved early enough.

Now, there was some talk today about early identification of the sites--an early planning process. The State of New Hampshire has a statute which theoretically requires utilities to do this. I was the draftsman of the statute, although a committee produced the document which created the law that Tony mentioned. I believed in it when it was written. I sat through the Seabrook state licensing proceedings, and I now think that it was of limited usefulness. I think, frankly, that in many ways it is a waste of time. States don't have the resources to get involved in the kinds of issues that the State of New Hampshire tried to get involved in in the Seabrook case. More emphasis in state laws should be placed on long-range planning. Philosophical debates and the protracted technical problems that are ever-present in individual nuclear licensing proceedings seem outside the scope of individual state regulatory capabilities. For example, we experienced in the Seabrook state proceedings many issues on which there was inadequate evidence to make a reasoned decision, primarily, I think, because the utility's program of study was timed for the NRC proceeding, two years away. Yet, rather than refuse to license the facility for failure of the utility to carry its burden of proof, the state agency simply issued the license--more an act of faith than one of adjudicatory judgment, I think.

So, at this point, I am beginning to wonder, maybe the State's role in these proceedings should not be as an initial regulator. Maybe the State's role should be that of a site and energy needs planner, along with the role that the State of New Hampshire took in the NRC licensing proceeding as an intervenor--to try to identify a segment of the public interest which the state government feels relatively confident in attempting to identify and represent.

Now, that is a hard thing to do. As a public lawyer, that is, a lawyer who is paid by the public, who doesn't represent a private interest, being in the Seabrook case was kind of a hard thing to do. I can remember walking out of the hearing room, and in one minute being accosted by an enraged supporter of the utility saying, "Why aren't you pursuing our interest?" And I would say, "Mr. Dignan is adequately pursuing your interests." Then I would turn around the corner and one of Mr. Roisman's or Mr. Backus's clients would accost me and say, "Why aren't you doing more to promote our interest? Isn't that the interest of the State?" Whereupon I would say, "Well, you are well represented by Mr. Roisman or Mr. Backus, and we are doing what we think we can do." It is a hard thing. But the point I am trying to make is that you can't rely on your public representatives to represent the entire public interest. Unless you are going to eliminate public interest entirely from these proceedings, you have got to give private intervenor groups a meaningful role.

I cannot agree more with what Tony Roisman says, that the only way you are going to do that is to give them money. The Seabrook record is a classic, and I hope the Nuclear Regulatory Commission itself has an opportunity to read it and has an opportunity to sit down and talk to people about it, because this is what they will find:

One. Cross-examination was too lengthy and often not to the point on the issues in which the lawyers did not have paid experts to advise them. On the issues in which the lawyers had paid experts to advise them, the cases were well made, the issues concisely laid out, and the cases well tried. For example, you might look at the financial qualifications case in which NECNP had a well-qualified witness and in which some of the other intervenors, including the State, had experts advising the lawyers. Compare that with the case on most of the radiation issues, in which either for reasons of financial availability (or even if finances were available, for reasons of the unavailability of experts because the brain power seems limited to one segment of the economy) there were simply no experts to advise the lawyers. The record pertaining to the latter is unwieldy. We find Mr. Roisman doing what he said he had to do on a number of occasions--spending a lot of time with Mr. Dignan's witnesses who didn't want to tell him a thing he wanted them to say. So the record itself, I think, makes the point very, very clearly, that you have got to fund intervenors if you are going to have them in the process at all, and if you want to streamline it.

Two. Where there was a direct case, the issues consumed fewer pages of transcript; they were better laid out and much more easy to comprehend, not only by the decision maker itself, but by a reviewing court in the event the dispute had to go to a higher level.

Three. The record was sloppy as well as cumbersome. The staff and the applicants incorporate testimony in the record as if read. They do that because they have the resources to make the multiple copies that are required with often lengthy testimony. In the Seabrook case, as you read the transcript, it is very nice and neat when you are looking at the applicant and staff case. The testimony is in the transcript. It is bound in it. You can read it, then you read the cross-examination.

Intervenors, on the other hand, including the State of New Hampshire, had to introduce testimony in a direct case as exhibits, because under the applicable rule, you can get away with three copies for the reporter and a copy for all of your opponents if you use an exhibit; but if you are going to incorporate it as if read, you had to put 30 or 40 copies in the record, and 30 or 40 copies of a piece of a 60-page transcript is very expensive to produce. Anyway, that makes the record sloppy. If there were more funds available, that aspect of a sloppy record would disappear.

Four. I mentioned the lack of input at the early staff review stage. I think it is very important. The staff's participation in these proceedings seems to have been written by Lewis Carroll. I have seen the staff take inconsistent positions on matters at different stages of the proceeding. It is a first-line decision maker; it writes the Environmental Impact Statement; it writes the Safety Analysis Report; and yet it is a party. The staff's role should be better defined, and if an effort is going to be made to streamline the process, let's look at the staff's role very, very hard. I suggest eliminating one of its roles--and if I were to suggest which one, I would suggest eliminating it from the hearing process.

Finally, the composition of Licensing Boards ought to be changed. Quite frankly, after being in three of these proceedings, I am not overly impressed by the Licensing Boards. Licensing Boards perhaps should be made up of experts not tied to the nuclear establishment. In an adversary proceeding, you have to have a lawyer as the chairman, but the Licensing Board at least has to be a board with continuity. In the Seabrook case, you didn't have a continuity of chairmen. You had one chairman for three-quarters of the hearing and another chairman for the last quarter of the hearing, and the record and the level of adjudication suffered. Arguably, the decision suffered. In any event, the nature of Licensing Boards is another thing which really should be considered very, very carefully in a consideration of the process itself. I will agree that Licensing Boards are getting better. The first Licensing Board I ever had anything to do with had a member on it whose dislike of the intervenors was readily apparent. I haven't seen that so much any more. Perhaps the institutional bias has merely become more sophisticated.

But again, if you are going to have a process with a judge, at least make the judge impartial. I haven't seen total impartiality in Licensing Board proceedings. I do not here suggest any impropriety. Rather, I find it hard to believe that a nuclear physicist, for example, whose entire career has been spent in the nuclear industry, will be able to listen to intervenor arguments about safety or long-term radiation impacts with a fully open mind.

I have a couple of suggestions:

I suggest the adoption of a pre-trial system like the Federal Courts have. Require the parties in these cases to identify their positions and eliminate issues in which there is no real dispute of material fact prior to the commencement of the evidentiary hearings. The present rules don't require that. Licensing Boards urge it, but there is nothing to compel the parties to do that. I think if that were done, you would shorten the record tremendously and produce a much more literate transcript, and a much better case for the decision maker.

Required consolidation of intervenor issues where you have several intervenors in a case should also be considered. Granted, we have to keep in mind due process considerations, but I think there can be a balance. Today, consolidation of issues is also urged by Licensing Boards. It is not mandated. In the Seabrook case, we had good cooperation and there was good consolidation of the issues for purposes of producing a direct case. But for purposes of cross-examination, there was little cooperation at all. Every intervenor's lawyer had his crack at the witness and that makes for a very long transcript. You can't deny everybody's crack at the witness, but I think there should be measures to encourage intervenors to get together a little better on coordinating their presentation of the adversarial case.

BIOGRAPHY OF SPEAKER

DONALD W. STEVER, JR., is an Assistant Attorney General, Chief of the Environmental Protection Division of the New Hampshire Attorney General's Office, which position he has held since 1972. He is a graduate of Lehigh and earned his law degree at the University of Pennsylvania. He has represented the State of New Hampshire before AEC and NRC in a number of cases, including Seabrook, and is principal draftsman of the New Hampshire Bulk Power Site Evaluation law. He also served as counsel for the public under that particular statute in connection with the Seabrook Station licensing hearings at the state level. He also teaches at New England College in Henniker, New Hampshire.

DISCUSSION

MR. BROOKS: I am Lynn Brooks from the State of Connecticut. Since I am going to be moderator of a working group, I felt I ought to get my licks in now before I have to turn completely impartial.

I think we have seen a good example, just from this panel, of what the adversary process does when you are trying to talk about a decision process. I get the strong feeling that both Tony and Tom could draw out of a hat which side they want to be on, and probably argue each side with equal facility, as good lawyers will do. And they presented very good, strong advocate positions.

I really wonder whether that is in fact, in this case, the best forum for answering the questions before us regarding public participation. The adversary process is one method of deciding questions, and there are many others. And we really haven't even gotten to, in terms of this particular issue, the question where can the public participation best fit into a decisional process. There are many, many decisions leading up to the decision to go ahead with the nuclear power plant in New England and particularly at Seabrook at this particular time--policy decisions. I would recommend to you that policy decisions are very difficult to be made through an adversary process. I think policy-type decisions made by judges through the adversary process tend to be very bad policy.

We have legislative procedures in this country, procedures for making decisions. It's worked very well for a lot of different kinds of things. I believe very much there is a strong place for the adversary system for deciding disputes and issues of fact, but I think we ought to look at the whole process instead of just concentrating on the adversary process as being the only one. If we have something wrong with our institutions, let's talk about how to make those institutions react the way they are supposed to in a democratic system, as opposed to building up another bureaucracy to be a watchdog.

The decisions to build electric facilities are not made in a vacuum. In our state, before a decision can be made, we have to interrelate them to such things as natural gas, petroleum, coal, and so on.

I think, Tony, your question of saying it would be easy to get the public involved in these decisions early is a little bit glib in view of what has been happening in this country in energy in the past two years. We can't get the federal government together. We can't get anybody together to talk about energy policy. Without an energy policy, how can you get the public involved in these decisions at an early point? I have been trying for two years to get these same public people involved in energy conservation, but in my state, a state legislator who was very anti- major power facilities gets arrested speeding at 75 miles an hour to get to a meeting on energy conservation.

MR. ROISMAN: I can't help you about the speeding legislator; you will have to deal with that one yourself.

On the question of the adversary process versus some other process, I have seen the other processes as well. I don't want to get too cynical about it, but the standard you have got to use to decide which process, is really what process will the public accept. The public is demanding a voice in the decisions that you are talking about, such as how do we use natural gas. I don't think that is a decision to be made by some policy maker in a board room, whether it is in a board room in which the public sits or not.

I think the use of natural gas--the extent to which we want to have more of it used for energy or plastics or heating our homes or cooking or whatever the options are--is something that we can all evaluate once we know what the facts are. I don't think that because you call it policy, it means that it should not be a process which is subjected to the adversary process. I think the key is that the adversary process is a vehicle for testing the validity of the assumptions which underlie what makes up a policy decision.

If somebody comes in and says, we have got x cubic yards of natural gas available in Connecticut for the next 30 years, and we can either use it for heating homes and cooking or we can use it to run turbines to generate electricity to heat homes or we can use it for a plastics industry, I think it is fair to say, well, let's find the people who assumed that those were the only options and let's determine that the amounts they allocated were the only things that could be used, and that the amount of energy that would be needed for each of those made sense.

I think policy makers have a tendency to see things from the standpoint of whatever interest they have been most influenced by. Citizen groups like the citizens in Connecticut are usually made up of the same kind of people in this room from citizens' groups. They're not in the business. That is their avocation, not vocation. Until somebody can provide the wherewithal to make it a vocation, they can't be an active participant. It may be that some questions they want to participate in don't need the adjudicatory process, but if you start by putting them in a position where they can afford to participate to begin with, you will get them onto square one. Most of them would gladly sell their souls just for an opportunity to come to a legislative hearing once or twice that is located more than five miles from their home, and to bring an expert with them who can talk about the subject.

What we have now is a process in which the heavily funded bring all the experts, go to the all the hearings, make all the cases, participate in all the seminars, go to all the conferences and have their say. And I would say that any policy maker who has this as his major source of input is most likely to end up agreeing with that position.

MR. DIGNAN: I think there are two aspects of the last question--and perhaps I am at fault here--that are premised on a misunderstanding. When I used the term "adversary process" in my remarks, I was talking about the full adjudicatory adversary trial type hearing complete with the sixteenth century trappings, to wit: cross-examination, objections and all that good stuff that lawyers love.

I am not advocating that you cannot have a hearing. You can have legislative-type hearings where people get up and state their point of view to the decision maker. So I think I may have misled Don because he indicated I was saying get rid of the democratic process which I am clearly not. I think where Tony and I diverge is that Tony believes that cross-examination is necessary to get the record, if you will, in the shape where a good decision can be made. I don't.

Now, if the speaker was indicating that he thought he was seeing a good example of the adversary process here, he wasn't. This is legislative, what you are hearing now. It is a pitch made. There is no cross-examination here. There are no objections. And it is that that I am arguing against, because it is terribly time consuming and frankly, it really isn't contributing, in my judgment, very much to sum of human knowledge. My learned friend to my right I know would disagree with me on that, but that is the issue between us. I am not saying do away with hearings; I am just saying do away with the lawyers' game.

MR. PAGLIN: It is planned in the working groups that the leaders will explore the various alternatives for resolving some of these issues rather than the trial type hearing.

MR. MOORE: There has been an awful lot of talk about the Nuclear Regulatory Commission, and I didn't realize when I came that that was going to be the subject of the meeting. Is the Nuclear Regulatory Commission typical of what people face--

MR. ROISMAN: Everybody will say no to that.

MR. MOORE: I spend a lot of time at FEA hearings. It is a whole different procedure.

MR. PAGLIN: Covered by a different statute, too.

MR. MOORE: I am just asking, is what people are complaining about largely limited to the Nuclear Regulatory Commission, or is it a kind of thing that you meet more generally?

MR. DIGNAN: I will shock you by saying that NRC is better than most agencies.

MR. PAGLIN: I will take exception.

MR. MOORE: Let me just make two other quick comments. Mr. Roisman said that the heavily funded come in with all the guns blaring; my observation, again being new to the petroleum industry, is that that is not as generally true as you seem to imply.

Take the case of land use, as an example, where a huge proportion of the public lands have been withdrawn from exploration without ever making even any testing to see what was being withdrawn in terms of what minerals are underneath them. This has been going on for 20 some years now. And you will find very little evidence of either the oil or the coal or any of the other, I guess, what you would call the big money people, coming to see what they were losing. The hearings aren't in Washington. They are generally in Butte, Montana or some place, and generally nobody goes except the people in the local area who want a park or something. So I don't think it is quite true. Everybody has his own thing that he is interested in and that is apparently worth his money and his time.

MR. ROISMAN: From the standpoint of the citizens' groups that I represent, their failing is not stupidity. It's only money. If the oil and coal industry let them take half of the lands that they have got oil and coal in out of the production process and didn't go to the hearings, we know it wasn't because of lack of money. It must have been because somebody was stupid.

MR. MOORE: That is a good example, I think, of what is wrong with this adversary process. There is another interpretation--who might pay the price. It may be the coal producers, it may be the consumers who don't have coal when they want it, who pay the price of having it taken out. It isn't clear who has been stupid there.

MR. ROISMAN: The consumers didn't have the money; I don't want to suggest that the right thing was done on the merits from anybody's standpoint--

MR. MOORE: There have to be other explanations for human behavior besides money and stupidity. There is some thread running through here that issues which don't get treated together can be. Let me give an example; in the Sears Island case, which we haven't discussed yet but which is in the book, there was a lot of opposition, both by New York and New England people, to the siting of a refinery. Subsequent to that, both New York and New England have appeared extensively before the FEA asking for the benefits that would come from having a refinery there, that is, lower cost fuel than they now get. I think there is somewhat of a problem there, that one of you might want to address--that people want to have it all, and when these things get taken up bit by bit they are not faced with the whole issue of having it all.

MS. ARON: Joan Aron, NRC. I guess I have had a growing list of problems related to assumptions all day, and the assumptions have been growing in volume certainly. They started off this morning with respect to the notion that bitter wrangling had a negative effect. I would argue strongly that in many instances it can have beneficial effects. Then, we seem to show a tendency to apply to intervening groups higher standards of performance than we are applying to staff or to applicants. And more recently, I guess I have quarreled with the assumption that attorneys are the only professionals who are involved in interventions.

The question I wanted to ask Tony, however, dealt with the assumptions that have surfaced both in the reading and in the response given by Mr. Edgar this morning, with respect to public support of intervenors, namely that, because intervening organizations have been able to intervene effectively and successfully in past cases, this is demonstrated evidence that they will be able to continue to do so in the future. Based on the history of reform movements, which have experienced difficulties over time in sustaining enthusiasm for their efforts, I wonder if you think this is an appropriate assumption with which to answer the question of public support.

MR. ROISMAN: I guess it would be comparable to saying that because the Public Service Company of New Hampshire got the Seabrook plant it won't need another one, ever.

I don't even think citizen groups have been all that effective, not compared to what they could be. Let me give you a couple of examples. We argued a number of issues in the Seabrook case. We brought some experts to the witness stand. We did not have the resources to bring all the experts that we wanted to bring on the issues that we were concerned with. We wanted to argue that energy conservation was a viable alternative to the Seabrook case. We put on the stand a very good young architect from New York, who testified on the basis of the amount of time he had to spend, about what it was in New England that was wasting energy in the residential and commercial fields that could be saved. Tom Dignan cross-examined him. The purpose of his cross-examination was to demonstrate that this man had not done an analysis of the actual building structures in New England to find out precisely how many houses do not have the proper insulation and how many new homes that are scheduled to be built won't have them, and how many buildings there are that could really be moved into a much better and more energy conservative area.

Without commenting on whether I think that cross-examination was effective, I think it's fair to say that we would have liked to have had an expert who could have taken the additional months necessary to do that kind of an analysis of what was in New England, to make the testimony even stronger than it was. That is a weakness which we could not correct and we wanted to correct it. We knew what we needed, we knew what would have been useful. We didn't have the resources to do it. Now, we could go down the list. I could tell you of clients that have come to me about cases that they want to do something about that don't have the resources.

Let me say, by the way, when I talk about resources, that we asked for money in Seabrook. I think, if I remember correctly, we asked for $100,000. We said we would try to raise 50 of our own. That would have made a war chest of $150,000. Of that, less than 50 was for lawyers and over 100 of it was for experts, and I think that ratio was probably the appropriate ratio.

Lawyers, for whatever the reasons are, seem to be more used to the idea of not working for money up front but working and then getting the money later, so for some reason or another, professionally you seem to be more able to get a lawyer to start a hearing than you can to get an expert to start doing two months worth of research work and tell him you are going to raise the money in the future. So you have seen more lawyers; in fact if you had more money you would see fewer lawyers because the lawyers that are trying to do the job that the experts couldn't would do better.

MR. SULLIVAN: My name is Jim Sullivan. I am with the Center for Science in the public interest. This meeting, like a lot of others, has begun to bother me to some extent. I feel a lot of contention going on. We are talking about the adversary process and it seems to me that that is the way we are discussing it here, too. I would like to suggest--possibly this is directed more at tomorrow morning's sessions than today's--but I would suggest that there is a basic fact here which, if we thought differently about the way we discussed it, would perhaps save us a lot of running around in circles.

The basic fact is that the whole process of citizen participation in energy decisions and especially in nuclear energy is a mess. There is no other way to describe it. Nobody disagrees with that here. Everybody has agreed that it is a messy process and that it should be made more efficient and more adaptable to the way that humans can interact. In other words, that is something nobody disagrees with. I think we are not really recognizing that. That is a problem. You can't escape that problem. The problem is not going to go away.

There are laws on the books; the Environmental Policy Act, the whole NRC statute, the FFA Act give citizens rights they never had before. With those rights, I doubt very seriously that many numbers of private citizens are going to give up their private vested interest and not participate in government when it affects their interest and when they have a right to participate. The problem is messy. The problem is not going to go away, and we should face up to that, rather than argue about whether or not citizens should get involved.

It seems to me that the proper question is not whether or not they are going to get involved, because they are involved and are going to stay involved. The question is, how are they going to get involved, rather than whether or not they should. It seems to me that very little has been discussed here about the different ways.

Tony has presented the reimbursement scheme. Donald Stever had a few ideas that I liked about pre-trial meetings, that kind of thing. It seems to me that there is very little experience of that, and I think some of the discussion here reflects that; there is very little knowledge of the way citizens can get involved. It seems to me that it is a lot more fruitful approach now to go off on that tack about "how" rather than "whether."

MR. PAGLIN: Again I reiterate, at the risk of ad nauseum, that is exactly what the purpose of the working groups should be. These cases are the launching pads, if you will. We hope the discussion in the working groups will bring some of these out.

MR. CHERRY: I would like to pose a question to Tom Dignan, I guess. This morning I tried to make the point that one of the problems with intervention in agencies is that they are willing to recognize the public's presence and then to try to show off the public's presence as a trade-off for their lack of public participation; and that participation really can't be made unless there is some way to exercise the opportunity.

I agree with Tony, that if there was money to hire experts, lawyers wouldn't be asked questions like I have been asked in numerous cases the night before, what are we going to do tomorrow. Then you end up coming up with a frustrated and long litany of cross-examination. Maybe I started the whole thing in Palisades. Let's focus on why we need cross-examination. It's the other side of the coin of access to information. Now, if you refuse to fund somebody and you don't give him the information or the money to go out and seek information so that he can put it in an affirmative case and make that process credible so that someone from MIT doesn't feel he is blasted in the industry because he has worked for an "intervenor," then I say, Tom, if you are not going to have cross-examination, because you don't think that is fruitful--I don't agree with that; I think it's a process of keeping the process honest rather than securing facts--would you agree you ought to have money, in order to enable people to be able to fund their direct cases, and don't you see at a minimum that those two things are beginning trade-offs?

If you want to restrict cross-examination to what you call sixteenth century techniques--and I must say I am kind of shocked that any lawyer in this day and age, with what we have gone through the last two years with lying to the public, will downgrade the process of cross-examination from any source--but if you want to do that, would you also now say that two or three percent of the cost of the nuclear power plant will be factored into the system, spread over the rate payers, in order to permit intervenors to present an affirmative case, without cross-examination? But I mean real money.

MR. DIGNAN: I think, Mike, my answer is this. I know you are not going to agree with it. I said I would get rid of the trappings of the adversary hearing. I think a separate question is, do you fund intervention. I said no, I don't think you do. I still see these are not--I know I am in a very distinct minority here; indeed I may be alone--I don't see these as public interests. I see these as private interests. People somehow deem it to be a public interest when one comes in with a point of view that is not underlain by a financial gain, but a private view is a private view, and it's a private interest. I don't see any reason why the public Treasury should finance the presentation of what is a private point of view held by certain people.

MS. BRINCH: Who pays for the utility?

MR. DIGNAN: The Congress of the United States has decided to have nuclear power. They can rectify it. I may shock you. I am all for it going back to the Congress. The question the lady just asked back there, don't the utility rate payers pay for the utility's presentations, the answer to that is yes, but the remedy there is not a question of whether or not we should fund the opposition. What you maybe should do is go down to the DPU in your state and tell them that in your judgment the question of a nuclear power hearing should be borne by the stockholders of the company rather than in the rate base. Now whether the DPU will agree with you, I don't know. But I do know that compounding the problem by putting the public Treasury up for every point of view to be presented, I don't think is wise.

MR. CHERRY: Tom, have you forgotten that the same act which you say pronounces nuclear power in the country also requests public hearings and also sets up standards for that. Let's assume nuclear power is terrific; it still has to be pursuant to certain standards. All I am saying, would you agree to fund people to gain information in order to demonstrate or not demonstrate whether those standards are met? This is exactly the kind of viewpoint that leads to what you call guerrilla terrorist tactics.

MR. DIGNAN: I never used the term "guerrilla terrorist tactics." Keep in mind that I am a lawyer, I work for a living, and as I've often said to Tony, I sometimes agree with Abe Lincoln, "God bless the man who sues my client; he keeps me in food." The point I am getting at is your question was, have I forgotten what the Act says. The answer is no. But the Act does not say on the record, indeed the Atomic Energy Act does not necessarily provide for adjudicatory hearings at all. That was a decision of the Commission. As for the funding, the Act says nothing about funding. I would question the wisdom of amending it to do so. I realize we disagree on that.

MR. STEVER: There is something in this last interchange that has come up before, today, and it bothers me a little bit. That is, the use of the word "public interest" is thrown around. Theoretically, either the Congress or--if the Congress delegates the decision--some regulatory board makes some decision as to what is and isn't in the public interest.

All of the actors in the nuclear regulatory game in the hearing room are, let's face it, private interests. Tony tried to clarify this. Everybody keeps coming back and saying I represent the public interest. They are all private interests. Tom represents a private interest. Even to an extent the state government is a private interest, depending upon who is pulling the strings at the head of the state government. I think we shouldn't get bogged down in a semantic agrument, which, I had a sense, is what is going on here.

MR. JENNINGS: I am William Jennings; I am a consultant. I have a little different approach to this problem than many of you have, because I have not been before now involved in any of these cases. I don't feel any of the animosity that I sense here. But I have run a Federal regulatory program. That is, I was the person who had signature authority to sign off on the regulations. I would like to tell you that I believe in public participation. There is a place for public participation early and often in the regulatory process.

Incidentally, mine also was a safety program. The business of settling things in government offices and private consultations with regulated industries is to me anathema. The public should be involved from the absolute beginning, and I can illustrate my interest in this because some years ago I developed what is now known as the advance notice of proposed rule making which is a way of going out to the public early to describe to the public what a problem is or what you think the problem is, and to invite public participation in definition of the problem and in the development of solutions to the problem.

As I see it here, the difficulty that you folks are having is that your regulatory process in its totality is wrong. The worst regulation in the safety field, the worst regulation there can be is the regulation which says come to me with a proposal and I will tell you whether you can do it. A safety program should be run by setting the standards which the regulated industry must meet, in as much detail as the technology permits you to give, and let the industry go ahead on that basis.

In this case, it appears that the problem of whether there should be the use of nuclear energy is tried every time there is an application for a site selection. Folly! There should be one single hearing in which the public is represented, in which a determination is made as to whether or not there will be nuclear energy, as to the parameters of safety for the plants and as to the site selection standards. Until that is done, the process is bogged down and will continue to bog down.

My thought to you is that this process itself is at fault, not the people involved in it. All of this animosity here results, I am convinced, from the inherent fault of the process itself.

MR. HARRIS: I am Saul Harris, National Association of Electric Companies. I am concerned with the whole worksop bogging down or focusing on the funding of nuclear intervenors and not the whole purpose for which we came. I would hope there was a preconference agreement on the ground rules for this workshop and we wouldn't get bogged down.

MS. SINCLAIR: I'm Mary Sinclair. I totally disagree with Tom Dignan's point of view that an intervenor enters a case to express his own private point of view. In the Midland case, I and other scientists--and I am a science writer and editor--entered into that case only because the AEC was not listening to its own best scientists who were raising safety questions in regard to the large-sized reactors that were being planned at that time, Midland among them. They were not listening to their own best experts on radiation standards that were being raised, and it was to get the thinking of their own best people and to require them to look at it that we entered the hearing, not because we had a private judgment or point of view that we wanted to raise. And I say your thesis is wrong as to the need for an adjudicatory hearing.

MR. BRADFORD: Peter Bradford, Utilities Commissioner in Maine. From my perspective as one who passes on issues involving utilities, including power plant siting, with some frequency, I can't imagine adopting Tom Dignan's suggestion that we do without cross-examination in hearings of that sort. The entire process of boiling down the testimony to a point where we can make some use of it and make some sense of it simply would not be served by a system in which experts would exchange testimony about each other's testimony and the process was not focused by specific questions.

The question I have is for Tony Roisman. I wonder whether you feel the intervenors should be funded out of taxpayer funds, i.e., through the public Treasury, or whether they're better funded by a Commission order directing the applicant utility to fund the intervenor's cases.

MR. ROISMAN: It seems to me that the logic of funding intervenor participation is (and that's where the public interest lies) in filing the record, making sure it's complete, not redundant, but that there are no gaps in it. In a way, to take that from the rate payers may be unfair. The rate payers may not have an interest in seeing that done, just as they are a private interest and we are a private interest. It's only the public Treasury which allegedly has that as its interest. The public Treasury is interested in making the right decision as best it can. It seems to me the logic is that you ought to put that cost on the public Treasury rather than on the utility.

I agree that the utility at heart ought to want to know it's doing the wrong thing. It ought to want to hear some expert that tells it, say, you've picked the wrong place to put this plant, or it's too early to be building, or it's the wrong kind of plant. But it seems to me as a practical matter, just talking about its salability, it's easier to sell it as funds from the public Treasury to pay only to the extent that you need it to complete the record.

I didn't get into the details of what the standards of public participation were, because I thought, as this other gentlemen did, that in the working group tomorrow we might get into some of the details. There is this bill that Kennedy put in which has a lot of details in it as to how one would go about determining who is qualified for funding, and it is public Treasury funding.

MR. BRADFORD: You would have citizens in Arizona paying for a hearing in New Hampshire?

MR. ROISMAN: Technically you would. As you do now in the sense that they pay taxes to fund the NRC's officers who do work on that case even though Arizona may never have a nuclear plant.

MR GRAVES: Glen Graves, National Science Foundation. We are one of the sponsors of the meeting. I have a comment for Tony, because I was rather intrigued with the question of, as I understood it, the depths to which he might be willing to go in pursuing pubic participation. Specifically, I am a little concerned myself that these questions, which have a tremendous complexity and interconnectedness, are perhaps better resolved piecewise than in taking them up in single hearing, for example, on the Seabrook case.

The example that Tony gave, I think, if I understood you correctly, was that given the opportunity, you would cheerfully explore a question like the availability of natural gas, nuclear, coal and so forth, the supply of natural gas to the state and alternate uses of that gas, for example for plastics. It would seem to me if you brought that up in a single hearing that you would find yourself being shortly forced to consider questions on the gas alone; for example, where it was, how much, how assured the reserves were, how new sources are likely to be found, how it's measured, how known, how it will be distributed, what is the probability that pipelines are coming into your area, and so forth.

If you wanted then to consider an alternate, single, competing use like plastics, you would want to consider the effect on employment of the use of plastics, the economic yield you might get if you were considering plastics, let's say, for sale to the automobile industry or vinyl seat covers or something of this sort; you would have to extend that ramification to the strength of the economy in that direction. You would want to look at the social and environmental effects, and you might even want to consider alternate sources of packaging beyond plastics themselves. In each case, you have the same kind of question. You go into home heating or whether you put this under the burners of a utility plant. Even when you get into the question of trade-off with conservation you have to ask from the utility's point of view how rapidly can these conservation steps be implemented.

My point is, it seems to me that perhaps society bites these things off piecewise; for instance, if the Federal Power Commission looks at gas situations and the FEA tries to make an analysis, you have competition there to try to discover the facts. Perhaps we might not be doing too badly if we treated this somewhat like we do with the people who pass out the auto inspection stickers; they do not, each single time, rule on the right of an individual to drive an automobile, but rather say we will set up standards which assure that if you come in, we will let you drive safely.

It seems to me we are somewhat established in that process today. The public utility commissions determine the need of the public for power with opportunities for intervention and with consideration of alternative sources; then the Nuclear Regulatory Commission is within its rights in trying to develop a means by which safe power, environmentally acceptable power, can be offered to the public; and then when they feel they have satified those criteria, ask the public to comment on it and react to it.

I am merely saying, how deep do you go in that? Are you fully convinced that you can't do that within the various bodies you have today?

MR. ROISMAN: If anyone at the National Science Foundation honestly believes the present mechanism we have for making energy decisions is even minimally acceptable, I am disappointed in the level of research of NSF. We have an absolutely miserable system because the kind of fundamental questions which should be asked and answered before you make decisions are not being asked and answered; but we are doing exactly the kind of piecemealing you are talking about--dealing with the present situation this moment, right now; don't give a thought to the future or to the past; only think about the present.

I think that it would be a grave mistake to think the Seabrook hearing ought to be turned into a discussion of the various things that could be done with natural gas. In the time we had today, there really wasn't an opportunity to get into it but I have proposed, in testimony in Congress, that we reorient our entire energy facility decision making process that begins by asking the first questions first, and having once asked them and answered them, not ask them any more.

What we have now is a process in which we neither ask them nor answer them, but rather instead go ahead with the assumption that we have both asked and answered them. So we assume that natural gas should be used for whatever the FPC thinks, and we assume that nuclear should be used for whatever the Nuclear Regulatory Commission and a utility think. I want to stop that. I want to answer those questions early enough so that we don't deal with them in Seabrook, so that the Seabrook hearing, if it comes as late in the process as this Seabrook hearing came, would deal only with those questions which could have only been answered that late in the process. I think it would be a lot more efficient.

MR. GRAVES: If I said something which implied it was only short-term, that wasn't my intent.

SUMMARIES OF CASE STUDIES

- Test At Sears Island
- North Anna
- Big Rock Point

INTRODUCTION TO SUMMARIES OF CASE STUDIES

MAX D. PAGLIN

We are now at the at the stage where summaries will be presented of the remaining case studies which are contained in your book. The purpose here will be to summarize the case studies for the benefit of those who have not had the opportunity to go through the actual texts. We do not propose to have a discussion at this stage. The purpose, basically, is to give you some information about these other three cases, so that you can have it for use in the working group sessions.

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TEST AT SEARS ISLAND, SUMMARY PRESENTATION

BY

ORLANDO DELOGU

UNIVERSITY OF MAINE SCHOOL OF LAW

By way of introduction--the project at Searsport involved the construction of an oil refinery which would take advantage of deep water that characterizes the approaches to and Searsport Harbor itself. These natural phenomena would allow supertankers to be used for the delivery of crude oil. The ultimate distribution of product by smaller vessels was envisioned.

The Searsport proposal arose after proposals for similar facilities in Long Island, New York and in South Portland, Maine had been rejected. Both encountered significant and serious local opposition.

Searsport did not have any local land use controls which would have to be dealt with and there did not appear to be any focused local opposition. Indeed, the city council and the local chamber of commerce expressed interest in and support for the project.

The proposal did have to deal with a state site approval law, and with state air and water pollution control licensing procedures, all of which were handled by a single state agency, the Department of Environmental Protection. It was in that context that a series of public hearings were held. The hearings were adjudicatory-type proceedings but they did not embody the full range of procedural safeguards that some have associated with this type of hearing--specifically, there were limitations on cross-examination. The emphasis

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was put on the presentation of an affirmative case, as opposed to the making of one's case through cross-examination processes.

The result of the public hearings was that the necessary license(s) and approval(s) under the site law (and the state's air and water pollution control laws) which were necessary to go forward were denied by the Board.

The applicant, a corporation by the name of Maine Clean Fuels, a subsidiary of Fuel Desulfurization, Incorporated, subsequently litigated the denial, asserting a wide range of errors alleged to have been made by the Board in the conduct of the hearing. The decision of the Board was sustained by the state's highest court, in re Main Clean Fuels, 310 A.2d 736 (1973). The applicant did not pursue alternative sites or seek to modify its plan in a manner that might have made it acceptable to the Board. As far as I know, the applicant is presently not involved in the pursuit of any oil related activities in Maine or elsewhere.

There were various types of public participation in the hearing process, both for and against the applicant's proposal. The opposition groups broke down into three quite distinct types. The first was an organized intervention under the rules of the Board by a consortium of environmental groups (The Coastal Resources Action Committee) that attempted from a variety of private sources to put together an adequate level of funding, engage counsel, and present a full rebuttal of the applicant's presentation as well as a complete case of their own opposing the location of an oil refinery on Sears Island. The second consisted of individual citizens who under the rules of the Board were accorded considerable latitude to make statements, present their views, and ask questions of both the applicant and the Board. From the standpoint of what lawyers would call "materiality and relevancy" a good deal of information not very useful to the Board was received. The third type of opposition was that presented by state agencies which viewed their particular constituencies as somehow involved or threatened by the proposed refinery proposal, principally the Department of Sea and Shore Fisheries, which purported to speak for the fishing interests in the area.

Public participation in support of the applicant's undertaking included at least one state agency, the Department of Economic Development. The DED had been instrumental in encouraging Maine Clean Fuels to locate in Maine and had, in many ways, facilitated the applicant's proposal, both by furnishing data and by efforts to inform the public and allay a growing range of public anxiety with respect to the project. A second group of public participants that supported the proposal could properly be characterized as complementary, and sometimes directly benefited industrial firms. They saw the coming of the refinery as a tremendous stimulus to economic activity--construction firms, railroads, trucking, marine-related activities. A third group of supporters were various types of chambers of commerce and local development organizations which, to a greater or lesser extent, favored the activity and voiced that support. Most of the public intervenors that supported the applicant tended to defer to the applicant's presentation of its case. They did very little to attempt to present independent reasons for acceptance of the proposal. But all of these groups very much wanted the fact that they supported the applicant's proposal on the record. They saw themselves as elements of the public that supported the project not to be confused with the applicant himself.

Relative to the interests of this conference--there were several important factors which led to the degree of public participation which in fact took place. First, the climate for such a debate in Maine was right. The Governor did not come out for or against the refinery. Indeed, he leaned over backwards to take an impartial view and indicated his support for the roles that both the Department of Environmental Protection and the Department of Economic Development were playing in the proceedings.

The Legislature had only recently passed what they regarded as strong, in many respects, landmark environmental legislation. They too did not bring pressure to bear, either positively or negatively, on the hearing process.

The board itself had unique membership. A wide range of educational, as well as work experiences were represented--the members were very much a collection of independent personalities. If one can talk in terms of regulatory agencies that are captured or not captured, this board, at this point in time, would have to be considered not a captive of any regulated interest or particular bias.

It should also be noted that this decision came when the bloom was on the rose of the so-called environmental movement. There had been no oil embargo. The economic downturn that followed very shortly after this decision was reached had not yet begun.

Another set of factors affecting the overall climate of decision making and public participation involved the proposal itself. The proposal seemed to be defective on its face. The applicant had no operating background in the oil industry--no marketing, refinery management or refinery construction skills. They were a group of entrepreneurs hoping to capitalize on some import quota tickets they had obtained. If needed state licenses and approvals could be obtained, they reasoned that ultimate development would be undertaken in association with established segments of the oil industry. Moreover, financing at that point would then be available. The proposal also seemed to be in the wrong place. It was viewed by many as akin to the proposal of the Bureau of Reclamation several years ago to build a dam in the middle of the Grand Canyon. The Bureau thought the plan was very sound--most of the rest of the country was appalled. Penobscot Bay, including the areas of Blue Hill, Castine, Vinalhaven and Sears Island, has a similar revered status in Maine. It seemed absolutely incomprehensible to many that such a site could be seriously considered for an oil refinery. The applicant's credibility was further eroded by some quick calculations presented by one member of the public. He put the plans of the applicant and Sears Island on the same scale and discovered that the plant extended beyond the Island by some one-hundred yards, no matter how you juxtaposed the plant layout on the Island. This to many seemed an incredible design flaw--a gross measure of unpreparedness that people couldn't quite get over.

Finally, at this point in time public involvement was a new thing in Maine. There had been some scary talk--an aluminum facility at Trenton, an oil refinery at Machiasport--but this was the first real proposal. The public was ready for the battle and was willing and able to join it. It had not yet been tired out. Its resources which are often limited, both in terms of money and personnel, had not been depleted. A weekly newspaper, the Maine Times, which at this point enjoyed widespread general esteem as a galvanizer of public interest in matters dealing with the environment, and the consortium of environmental organizations which had recently done battle in the legislature and succeeded in enacting several environmental laws that were regarded as landmark were the catalysts which recognized the climate I've described and produced the public involvement in this decision making process. It is unlikely that this combination of factors will ever exist again. It is unsafe, therefore, to utilize the experience of Sears Island as some sort of bellwether--a model of successful public involvement in energy related decision making. There are few lessons that may be carried over into other jurisdictions and other contexts.

I would add that judicial affirmance of the Board's decision bears out the argument that energy related decision making which includes a high degree of public involvement can produce sound and legally sustainable judgments. The decisions of the Board in the context of the Sears Island proposal should not be interpreted to mean that Maine is against an oil refinery. This proposal at this time in this place was not permitted to go forward. A new proposal would have to deal with all of the constituent elements of the climate of today's times. It is impossible to predict an outcome.

Addendum

An argument can be made that the whole concept of public participation in energy related decision making is a sham. Though some in government and in the private sector warmly and sincerely support the concept, powerful interests and decision makers remain who really do not want any broadening of public participation in these areas. But it has become politically inexpedient to articulate this opposition. So those nominally opposed to public participation wind up giving lukewarm support to the idea. In their minds such participation though generally unwanted has the limited value of justifying and putting an acceptable gloss on potentially contentious energy related decisions.

Evidence of this ambiguous and duplicitous posture was certainly to be found in many of the statements made by government and industry representatives at the conference. They called for public participation but emphasized that it must be brief, to the point, and should not contribute to delay in the decision making process. They called for public participation, but were unresponsive to the funding needs which such participation would require. They called for public participation but wanted it to be limited to agency determined issues, often narrow in scope and not germane to larger issues presumably reserved to agency decision making processes. Public participation was to be responsible and was to graciously acquiesce if and when decisions emerged which were contrary to the views expressed by the public participants.

In this context of constraints there can be no effective public participation. That is not to say that public interest groups will not succeed from time to time in politicizing an issue so that larger basic questions may be raised--and there will also be times when unique circumstances will exist, such as the Sears Island decision in Maine, where public involvement and input will be a significant part of the decision making calculus. But both of these sets of circumstances are rare exceptions. They do not represent an effective mechanism for public participation.

In short, we need to do much more than we now are to facilitate real public participation in energy related decision making. The present level of public participation is either the product of fortuitous circumstance and/or worse yet, it is an outright sham.

BIOGRAPHY OF SPEAKER

ORLANDO E. DELOGU is a Professor at the University of Maine School of Law, specializing in property, land use, water resources and environmental law. He received his undergraduate degree at the University of Utah and a masters in economics as well as a law degree at the University of Wisconsin. At the time of the Searsport proposal he was a Commissioner on the Maine Board of Environmental Protection.

NORTH ANNA, SUMMARY PRESENTATION

BY

H. PAUL FRIESEMA

NORTHWESTERN UNIVERSITY

Part of the importance of this case, I think, is the very complexity of it. As in many of the other cases, things are going on more or less simultaneously, resources are expended, and so forth, by people operating at different levels at different times. In any case, the actors of importance to whom we have not yet been introduced today are the Virginia Electric and Power Company (VEPCO), a utility who hoped to construct the North Anna Nuclear Power Station Units 1 through 4; and a group called the North Anna Environmental Coalition. The North Anna Environmental Coalition was clearly a misnomer in that it was not a coalition of existing groups, but rather was a very small, almost discussion-type group, which at its maximum had a membership which they claimed reached to 100. Members paid $2 dues per person, which meant that they never had more than $200 at one time. Those are the actors. The others are the people we already know, the Atomic Energy Commission and its various agents.

VEPCO received a construction permit with relatively little difficulty for North Anna 1 and 2 in February of 1971. Some seven months later VEPCO applied for a construction permit for North Anna 3 and 4.

During the excavation for 3 and 4, but before any permit had been issued, anomalies in the rock were noted, suggesting that there was a fault, that there was a possibility of an earthquake hazard. Shortly thereafter, at hearings of the Atomic Safety and Licensing Board on VEPCO's application for a construction permit for Units 3 and 4, VEPCO did not mention the possibility of a fault.

Sometime later they did notify the staff of the Atomic Energy Commission that something was there and that they were beginning studies. The staff didn't notify the Safety Board either for many months.

Meanwhile, the North Anna Environmental Coalition, this small discussion group which was trying to raise issues about North Anna, was trying to find out about seismicity and about the risk here. Their suspicions were initially aroused at a public meeting on nuclear power where a construction worker at North Anna 1 and 2 had raised the question in the public discussion about what it meant when they were drilling through hard rock and came upon clay. Didn't that suggest that there was something wrong, and that that was a bad site? In the efforts of the volunteers to find out whether there was an issue of an earthquake hazard, they finally were able to confirm in a telephone call with someone from the staff of the Atomic Energy Commission that, in fact, there was a fault there.

The small environmental group then sent out a news release. The news release generated the next stage, which was a report to this environmental group from a geology professor at a nearby college, that he had observed a fault there as far back as 1970 at the site;

had, in fact, brought a couple of his colleagues to help confirm that there was something there; and had informed the utility's resident engineer about the problem. So in fact, the omission of advising on the existence of a fault extended further back. On this basis, the environmental group asked to reopen the construction permit hearing on 3 and 4. They asked the Regulatory Commission staff to do a number of things, and otherwise tried to use that classic tactic of interest groups without resources trying to generate other support from other groups--went to the state, and so forth, trying to get support for these activities. Later on they asked that the licensing for North Anna 1 and 2 also be revoked because of materially false statements made in the application by VEPCO, as well as asking permanent withholding of the licensing of 3 and 4.

Later on, the Director of Regulation for the Atomic Energy Commission did issue a show cause order on why construction of 1 and 2 should not be suspended pending completion of the AEC's geological investigation. They filed a motion for further hearings on 3 and 4, but did not raise the question of the materially false statements at this time.

Subsequently these matters were joined. The Commonwealth of Virginia joined the environmental group in raising the issue of materially false statements at a preliminary hearing on the matter. This was set aside so that the prior question of whether to halt construction on 1 and 2 could proceed.

A hearing was held; there were some limited appearances made by citizens. The parties who had intervened were the State and, of course, the small environmental group. The small environmental group did get, at the very last moment, a voluntary attorney, a professor of law at a university, who assisted them. They had some voluntary geological experts from a local college. They were up against, of course, the very well qualified experts of the company. The outcome, I think, would be predictable. The Advisory Committee was convinced that the safety of the facility was assured, that this was not an active fault; and the Safety Board, essentially, allowed construction to continue, and within a short time they granted the construction permit for 3 and 4.

Meanwhile, the staff had issued a report on the materially false allegations, all of which related to VEPCO's withholding information which they presumably had on the fault, and they found that there was no cause of action.

This was then brought to a hearing. At the hearing the Safety Board ultimately imposed some fairly severe sanctions upon the company, to the tune of a penalty of $60,000, I believe, and a number of restrictions or positive actions they must take in order to assure that such occurrences would not happen again. That was subsequently reduced on appeal within the AEC and is still pending review by the entire NRC.

BIOGRAPHY OF SPEAKER

HARRY PAUL FRIESEMA is associate Professor of Political Science and Urban Affairs at Northwestern University. He received his undergraduate education at Michigan State University, a law degree at the Detroit College of Law, his master's from Wayne State University and his doctorate from the University of Iowa.

BIG ROCK POINT, SUMMARY PRESENTATION
BY
JOAN SCHUMAKER
UNIVERSITY OF MICHIGAN

The critical role that local public intervenors can play in energy related decision making was illustrated by Western Michigan Environmental Action Council. They have succeeded in elevating the question of plutonium recycling at a local nuclear power plant, Big Rock Point in Charlevoix, Michigan, into a generic rulemaking proceeding. While the Atomic Energy Commission, currently the Nuclear Regulatory Commission, had committed themselves to studying plutonium recycling at an earlier rule making, the Council's efforts served to crystallize and hasten that action.

The controversy originated when the AEC approved an amendment to Big Rock's operating license allowing the utility to triple its current core load of plutonium, thus introducing recycling. The amendment was granted without public notice or hearing in accord with standard AEC procedures at that time. In response, Western Michigan Environmental Action Council filed for an injunction against implementation of the amendment in the Federal District Court of Western Michigan on March 9, 1973. The Council's directors perceived the AEC's procedure as an effort to quietly introduce the new technology without giving the opportunity for public participation in the decision making process.

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The Council's actions were designed to produce broad public debate on the issue of plutonium recycling and to force the AEC to write an environmental impact statement for Big Rock. They chose a legal suit as the most effective way to achieve those goals for two reasons. A legal suit would provide much needed visibility on the issue. It would also provide the Council with a valuable court overseer as a safeguard against lengthy agency procedures. By not announcing its intent to issue the amendment, the Commission foreclosed the option of anyone demanding a public hearing. The Council's choice of a legal suit and the speed with which it had to be filed precluded significant public involvement. Ironically, the suit was brought to ensure public participation in the decision making process, but did not utilize public participation itself.

In the course of the suit, the Western Michigan Environmental Action Council also forced the AEC to consider the controversial question of financial aid to intervenors. Due to the Council's limited funds, its lawyer has been forced to volunteer his time. Some have suggested that if the Council's suit had been more grass-roots oriented, perhaps more funds could have been raised.

The defendant, Consumers Power Company, has been effective in mitigating major local opposition to implementation of the amendment. Utility officials defend their actions on the grounds that the technology under question has already been in use on a smaller scale at Big Rock for more than three years without mishap.

In early 1975, after three years of administrative proceedings and before a public hearing was ever held, the NRC decided to halt further action on the Big Rock case until they had reviewed their existing policies. The review had three objectives: 1) To consider the generic issues raised by plutonium recycling in a generic environmental impact statement; 2) to determine NRC policy on interim licensing; and 3) in a collateral rule making proceeding, to resolve the question of financial aid to intervenors. To date, progress has been slow but optimistic. The generic environmental impact statement on plutonium recycling, not including consideration of the safeguards issue, has just been completed. Last May, a United States Court of Appeals decision restricted the use of plutonium to strictly scientific purposes. Lastly, Congress is now considering a bill to provide financial assistance to intervenors.

BIOGRAPHY OF SPEAKER

JOAN SCHUMAKER is a senior in the School of Natural Resources at the University of Michigan. In the summer of 1976 she participated in the University of Michigan's Washington Intern Program. She worked closely with the Federal Energy Administration's Office of Consumer Affairs/Special Impact while researching the Big Rock Point case study. She has served as lobbyist and student coordinator for PIRGIM (Public Interest Research Group in Michigan) working on special projects: legislation banning nonreturnable bottles and regulating transportation of nuclear wastes. She also designed a course entitled "Environmental Problems of the Northern U. S. Rockies" along with an intern program to place interested students in environmental organizations in that area.

BIG ROCK POINT, SUMMARY PRESENTATION

BY

ERASMUS H. KLOMAN

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

As originally planned, Joan was going to give you the rundown on the basic facts in the case while I was going to try to draw some of the lessons. I would like to refer to the entire workshop, however, since I have been the secretary of the academy panel that has put this conference together, in cooperation with MITRE.

I have been taken by the many references we have had to lovemaking, and to mutual consent in family planning. Several people have asked me whether we are getting out of this exercise what we were hoping for. Let me say, that I never expected it to be a love fest. I never thought that after we got through everybody was going to stand up and kiss. I didn't think that we were going to convert many people who are standing on opposite sides of the aisle, but I do think it has been something of a feat just to get some of you in the same room together. One of the things it seems to me to prove is, unfortunately, "time wounds all heals." There's an awful lot of simmering resentment still around. We can't even seem to get agreement on whether this is good or bad. On the one hand, we have Jim Sullivan making a very convincing and persuasive case to recognize that the whole process is a mess, and that we should try to start cleaning it up. But then Joan Aron tells us that a little bit of tension and a little bit of acrimony are just fine. So I don't know where we are going to find agreement.

I do think there is a substantial amount of agreement that the way the system works is not good. But, you go on from that, and I suspect that you would find a 180 degree difference on why it isn't good. The things that some people think are bad about it are just exactly what others would say are fine.

What strikes me about those lessons of the Big Rock Point case that seem to converge with several of the things that have come out here comes down to two or three points.

First of all, I think that the Big Rock Point case suggests the need for reducing the number of surprises that are popped on the public. There is not enough in the way of future-oriented planning going on in the various levels of government. The states are moving more in that direction but there is a lack of Federal leadership to provide incentives for that.

The Big Rock Point case was an example of surprise being sprung on the public and a group of environmentalists taking issue with what was going on, never getting recognition for being more than ardent, far-out antinuclears, and yet pressing their case to the point where they helped to raise it to a national issue and where they have substantially been vindicated--but without any funding, to the point where they have incurred a very substantial debt.

That is another lesson, it seems to me, to emerge from the Big Rock Point case. I can't help but feel that there is a strong argument for the funding of the intervenor groups.

The only way this case was pursued was via the contributed time of some strongly dedicated lawyers. They are not going to be able to keep contributing that time. So, to me, the weight of the evidence is on the side of funding of the intervenors.

Some of the cases that we have discussed prior to this have been characterized as failures, or as examples of how not to go about reaching decisions--the time delays, the amount of acrimony, the amount of wasted effort on the part of all the parties involved. It has been suggested that these are all negative. To some extent that is true of the Big Rock Point case. However, I would say that here you have a better example of what the adversary process can achieve. The real problem is that the issues still are pending and particularly the question of the funding of intervenors.

BIOGRAPHY OF SPEAKER

ERASMUS H. KLOMAN is a Senior Research Associate of the National Academy of Public Administration and Executive Secretary of the Academy's Standing Committee on Environmental and Research Management. He has served as project director for several studies on energy related topics undertaken by the Academy for Federal agencies including the National Science Foundation, Federal Energy Administration, Energy Research and Development Administration, and Congressional Research Service of the Library of Congress. He is the author of a number of articles and monographs dealing with public participation in areas of science and technology policy. In his capacity as Secretary of the Academy panel for this workshop, Dr. Kloman has coordinated the preparation of the case studies and other aspects of the panel's efforts. Before joining the Academy staff, Dr. Kloman served in the federal government, in academia and in industry. His background is in political science and economics with an undergraduate degree from Princeton, MA from Harvard, and Ph. D. from the University of Pennsylvania. He is an Associate Professorial Lecturer in Business Administration at George Washington University.

WORKSHOP PROCEEDINGS

WEDNESDAY SEPTEMBER 22

LUNCHEON ADDRESS

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REMARKS
BY
BRUCE J. TERRIS
BRUCE TERRIS ASSOCIATES

I must start by admitting that the subject of your workshop is one close to my heart. I have a law office composed of what is commonly referred to as "public interest" lawyers. That label is rather misleading because neither public interest lawyers nor their clients always or perhaps even usually actually represent the public interest. We are no more unbiased or perceptive in ascertaining the public interest than anyone else. The sense in which public interest lawyers do represent the public interest is that we represent elements of the public which have not normally had the financial means to participate in legal and administrative processes. We claim, I think correctly, that this broader public participation is in the public interest.

The subject of this workshop is a portion of this broader subject of public participation generally. The issue of public participation involves not only administrative agencies but the courts, Congress, and private institutions such as large corporations. It involves not merely decisions concerning energy, but other environmental issues, consumer matters, political and corporate responsibility, and virtually every other important question in our society.

I do not intend in the limited time I have to discuss public participation generally because the topic is well beyond the specific

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subject of your workshop. However, I do want to emphasize that the subject you are discussing is tied to the broader issue of public participation in other areas. It is extremely unlikely that changes in public participation concerning energy decisions will not affect public participation in other areas and vice versa. For example, the Kennedy-Mathias bill, which would provide funds for participation in agency proceedings by groups which otherwise would not have sufficient resources, must be judged by its impact on all Federal agency decision making and would affect energy related as well as other decisions.

The first step in evaluating any reforms, including the ones which are the subject of this workshop, is to determine as precisely as possible the problem to be remedied. I know that is what you are doing in analyzing the six case studies. I would like to try to make some small contribution to your deliberations by giving you my definition of the problem which is based upon representing public groups in a considerable number of situations where energy issues were being decided.

The overriding reason for public participation in energy related decisions and all other important decisions in our society is simply that it is demanded by our most basic democratic principles and ordinary justice. There is simply no reason in a democracy for allowing participation only by groups with wealth and power. All portions of the public are entitled to be involved in important decisions. Yet, the actual practice in this country until recent years has been directly to the contrary and even today public participation is extremely limited. This has been caused by many factors such as technical legal rules, but most importantly, by lack of financial resources.

I would therefore argue that broad public participation in energy related agency decision making is essential whether it will aid or harm decision making or whether it will make decisions more or less correct. However, I believe that public participation will certainly lead to far better planning, will force far more careful analysis of the decisions which are made, and will lead to far better results for the public. I think we are already beginning to see this occurring even though public participation is still far too spasmodic and weak.

I suppose that the reason that I think public participation will be helpful is that I believe that energy related decisions have been generally abysmal. It is not difficult to find a few examples. The import quota on oil resulted in the rapid exhaustion of America's scarce oil resources. The artificially low prices of natural gas established by government regulation had the same effect for natural gas, which is probably the most desirable fuel which is now available. The decision by state regulatory agencies to allow utilities to promote consumption of electricity and gas has helped produce an economy which wastes energy in tremendous quantities. All these policies which assume abundant supplies of fuel exist continued up to and often even past the point where we knew that a serious shortage of energy existed now and would get worse in the future. These are of course only a few of the major blunders in the energy field.

I am not talking, however, just about substantive decisions although they often have been terrible. I also believe that decisions have been made in so haphazard a manner that it has been more luck than wisdom which has produced sound decisions even when they have been correct. Again, a few examples may be suggestive. I litigated a case involving the construction of an enormous coal-burning power plant in Kansas in which the company had made no studies--indeed, did not have a single piece of paper--discussing such critical issues as the effect on ground water supply or quality, on pollution of the Kansas River, or the alternative of building the plant close to the source of the coal in Wyoming rather than at the point of consumption. The company simply relied on its purported commitment, which it had little idea how it would honor, that its huge ash disposal site would not allow leakage of toxic substances into ground water. The utilities were condemning hundreds of acres of fertile farm land without the approval of a single government agency, state or Federal.

Similarly, the federal government has entered into literally hundreds of coal leases in the West without any decent environmental analysis, simply in response to the desires of the coal industry. No environmental impact statement has ever been done on any Federal coal lease before it was made. The Federal Power Commission still handles applications for large and hazardous LNG terminals on a case-by-case basis without any criteria for determining whether such plants should be prohibited in urban areas in order to protect safety. I am sure that any of you could add to this list.

My point is that energy decisions, both small and large, have been made substantively and procedurally in a manner which is totally irresponsible. I of course do not believe that citizen participation will cure this problem entirely. However, I do believe that citizen pressure, citizen supervision, the ability of citizens to embarrass, to publicize, to pressure politically, and, if necessary, to litigate the actions of public officials does result in better decision making.

The Council on Environmental Quality has published an extensive report on how the National Environmental Policy Act, largely because of the new opportunities given citizen groups to participate and litigate, has significantly changed the actions of Federal agencies affecting the environment. We know that citizen participation makes decision makers much more careful in what they do. Even private decision makers, like those in large corporations, are far more careful if citizen groups are looking over their shoulder.

I mentioned the totally inadequate analysis and decision making process in the Kansas power plant situation. During the litigation involving that plant, which the citizen group ultimately lost, I spent much of a day cross-examining the president of the utility.

It became clear even to the president himself how inadequately his company had approached the environmental issues. He told me afterwards that the company would never approach an important decision in a similar fashion again.

I would like now to turn to a more specific discussion of public participation in energy decision making. In analyzing this issue, it is important to remember that there is no single set of procedures for making governmental decisions. The procedures which are provided range from allowing citizen groups the opportunity for full participation in decision making to providing little opportunity for participation at all.

Let me give three models. One situation involves an adjudicatory proceeding before a quasi-independent agency. Examples include licensing proceedings before the NRC, and LNG pipeline and curtailment proceedings before the FPC, and rate proceedings before state utility commissions. Notice is often provided in the Federal Register of Federal proceedings. A citizen group which can show an interest--a test which is usually not very onerous--usually has access to the entire record considered by the decision maker, can cross-examine and otherwise challenge the evidence of the other parties, can present its own oral and documentary evidence, can write briefs to try to convince the decision maker, and can ultimately challenge the decision in court. In other words, the citizen groups have as many rights as the private corporations involved and often even as the staff of the governmental agency.

Another situation involves rulemaking either by a quasi-independent or an ordinary executive agency. Notice of such proceedings is given in the Federal Register and hearings are often held to allow citizen groups to present testimony. Even when there are no hearings, citizens can submit written evidence and memoranda in order to convince the decision maker and can challenge the rules in court. However, cross-examination of opposing evidence is not normally permitted and citizen groups do have not have access to all the information and documents considered by the decision maker. Even more important, the decision tends to be farily foreordained since agency rulemaking proposals are usually made only when the agency decision makers have a quite clear idea of the results they desire. Nevertheless, citizen groups have the same rights as corporations with an economic interest in the issue.

The third situation is when a specific decision, not involving rulemaking, is made by an executive agency. These include coal and offshore oil leases entered into by the Bureau of Land Management, approval by REA of loans for rural electric cooperatives, and decisions by the Corps of Engineers and Bureau of Reclamation to build dams to provide hydroelectric power or water for energy related activities. Prior to the passage of NEPA, no formal procedures usually existed. No notice was given of the decision, no hearings were held, no opportunity provided for submitting oral or written evidence or memoranda or for challenging the information submitted by a private applicant or the agency staff. The only rights provided were to lobby informally with the agency and, if this failed, to challenge the decision in court after it had been made.

NEPA has somewhat changed this situation. If the action involved is a major Federal action requiring the preparation of an environmental impact statement, notice of the draft statement must be given in the Federal Register. Citizen groups can comment on the draft and ultimately final environmental statement and occasionally hearings are held to allow the presentation of evidence.

It is important to emphasize the limited nature of the rights given citizen groups by NEPA in those situations where no other statute provides procedural rights. It applies to no decisions which do not have a significant effect on the environment. It does not even apply to non-environmental issues relating to decisions which do have a significant effect on the environment. Even as to environmental issues, there is no opportunity for cross-examination to challenge the information of others. Citizen groups do not have access to the entire record since the environmental impact statement is merely one document considered by the decision maker and frequently it is hardly even an important one. In the Department of the Interior, for example, the Program Decision Option Document is the real decision making document and it is not made public.

You are considering in great detail at this workshop public participation in the first two situations I have described--energy decision making in adjudicatory and rulemaking proceedings. Perhaps I can add to your discussion the experience I have gained from participation in an extensive adjudicatory proceeding before the Federal Power Commission involving the siting of LNG terminals. This proceeding has stretched over a period of more than 4 years and is not yet completed. It has involved over 10,000 pages of transcript and hundreds of documents. There have been repeated delays caused by the staff of the Commission and by the industry applicants. While numerous citizen groups are deeply interested in the proceeding because of serious dangers LNG terminals pose for public safety, not a single one has been able to participate effectively and continuously. The effective citizen representation has come from those, like myself, who have some governmental entity as a client.

This experience suggests two things to me. First and foremost, citizen groups generally cannot now participate effectively in energy decision making. I have described above the extensive procedural rights which are provided on paper in adjudicatory and rulemaking proceedings. However, these rights mean little unless there are funds available to pay for experts and attorneys. Even in proceedings far less extensive than the one I have described, citizen groups do not normally have the resources to participate effectively. When they occasionally do participate, they tend to do so on a shoe string without adequate funds for experts or often even to have their counsel attend all the proceedings.

In short, the public has a legal right to participate effectively in many energy decisions but cannot actually do so. The obvious response to the problem is governmental funding such as that provided in the Kennedy-Mathias bill.

We fortunately have an example concerning how government funding can work to provide citizen participation in agency proceedings. The Federal Trade Commission has provided $500,000 to consumer groups to provide representation in rulemaking proceedings on a variety of consumer issues. The funds have been used to conduct studies, pay experts, and provide counsel who cross-examine other witnesses and prepare factual and legal memoranda.

The result has been that consumer groups, who were rarely represented in FTC proceedings at all, now generally have representation similar to that of industry trade associations which have of course always been represented. The consumer groups have been extremely pleased with the opportunity to participate effectively. Perhaps more surprising, the staff of the FTC has been enthusiastic to have consumer representation and strongly believes that it is improving the decision making process without imposing any undue burden or delay. While the FTC experience of course does not involve energy issues, there is no reason why it is not applicable to other kinds of agency decision making.

While I strongly support government funding for citizen groups which do not have the resources to participate, it is important to realize that such funding will almost certainly still not give citizen groups equal opportunity in the decision making process. It is extremely unlikely that sufficient funds will be available to hire high-priced experts for adequate periods of time to study thoroughly the issues involved. Consequently, it will continue to be extremely difficult for citizen groups to respond adequately to the experts and studies which can be presented by utilities, coal and oil companies, and other corporations with both a high financial interest and the money to do whatever is necessary to argue their case.

Second, there is a great need to simplify and expedite agency procedures. This is necessary not only to allow more effective public participation but for numerous other reasons as well. The present quagmire in many administrative proceedings greatly delays decisions which need to be made promptly, adds significant costs to agency operations which must be paid for by the taxpayers, and is seriously unfair to private corporations which are also entitled to a prompt and fair decision.

Citizen groups have a substantial interest in simplifying agency procedures. Even if government funding is obtained, as I believe it soon will be, it will be limited. Simpler, quicker procedures are essential to allow limited government funds to be used effectively.

It is also important that greater public participation not be seen as bogging down agency proceedings still further. If this begins to result, there will be great pressure to reduce, rather than increase, the rights of citizen groups. Consequently, citizen groups should be pressing for procedural reforms at the same time they stress the right to full participation.

I would like to suggest one way that agency decision making can be simplified. Many adjucatory proceedings involve issues which are generic to many proceedings and should be determined through rule making. For example, the Federal Power Commission is conducting a number of lengthy proceedings on the siting of LNG terminals in different parts of the country. Yet, it has no siting criteria which will minimize the danger to public safety. As a result, each proceeding involves extensive, time-consuming and largely identical evidence concerning the dangers caused by the storage and transportation of LNG. A rulemaking proceeding, if it included the opportunity for cross-examination, would be far less costly and far quicker for determining such issues.

I realize the difficulties which greater reliance on rulemaking may cause for citizen groups. It means that citizen groups cannot wait until an LNG terminal or coal lease threatens their particular locality. By the time that occurs, most of the important issues involved may already have been settled through rulemaking. Consequently, if rulemaking is relied upon more extensively, national citizen groups will have to be more vigilant to participate in rulemaking proceedings which decide important questions before they are actually applied in individual situations.

I would like to discuss now the other kind of energy decision making which involves few, if any, formal procedures for public participation. Except where NEPA applies, and often even when it does, the opportunity for public participation is totally inadequate. It is likely that these situations are far more common than those which are involved in the cases being considered in your workshop in which formal procedures for public participation exist.

I believe that formal procedures for public participation are essential for all important government decisions, including energy decisions. Public participants should receive notice of all important decisions well in advance, should be given access to all the information upon which the decision maker will rely, should have the opportunity to submit their own information, and should have a fair opportunity to rebut information presented on the other side. These rights should be guaranteed whether or not environmental or any other particular category of issue is involved. These procedures need not be as extensive as for adjudicatory proceedings and need not be unduly cumbersome or time-consuming. In addition, just as in the case of adjudicatory and rulemaking proceedings, government funds should be available to allow citizen groups to participate fully and effectively.

I would like to conclude by emphasizing a point with which I am sure all of you agree. It is that public participation in important decisions, such as those involving energy, is at the very heart of our democratic process. In our bicentennial year, it is worth remembering that we have boasted in this country for 200 years about how every person is equal before the law, about how all groups can participate in making decisions, about how we settle disputes in administrative agencies and courts through the adversarial process with each side presenting its case to an impartial tribunal. Each of these statements could be supported if we looked simply at our laws. The public can participate if it has the resources to do it. However, the reality is that citizen groups for most of our history rarely have participated in decision making and even now their participation is often infrequent and ineffective because they do not have the resources. The challenge today is therefore to turn our most basic democratic theory into actuality. I hope that this workshop will be helpful in the achievement of this important goal.

BIOGRAPHY OF SPEAKER

BRUCE J. TERRIS is an attorney in private practice in the District of Columbia, principally in public interest law. He is co-founder of and has been senior attorney at the Center for Law and Social Policy, a nonprofit organization representing consumers and the poor. He earned his undergraduate and law degrees at Harvard.

DISCUSSION

MR. KELLY: I was particularly interested in your reference to the Trade Commission's experience under their recent statute. I believe you said the consumer groups and the FTC staff were enthusiastic about how it would work. Is that as a result of informal contacts or has this been written up in a report someplace?

MR. TERRIS: There is a speech around by Joan Bernstein, who used to have general supervision of the program, that I think is going to be put finally into article form. I have read the speech and it is very enthusiastic and it purports to represent the Federal Trade Commission staff, generally, so I assume that is accurate. We do a considerable amount of that work before the Trade Commission, and the staff has been extremely eager to have consumer participation--perhaps because they thought it was going to agree with their own views, but they still have been eager.

MR. GRAVES: You have dealt with some of the more unpleasant aspects of the energy situation today, particularly the unnaturally low price of natural gas which has led to its overconsumption, but wasn't that one of the examples where public participation in setting the price, at least as interpreted by the Congress and the FPC, led to that? How does one get around that dilemma?

MR. TERRIS: There was public participation, if what you mean is that Congress set prices because it believed, I guess, that more Americans wanted to have low prices than to allow a free market to

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operate. I suppose it is true, there was public participation in that sense. There certainly, though, hasn't been public participation in a very effective way in most proceedings before the Federal Power Commission. I think if you are going to blame that decision, that you can blame the decision as an irresponsible one or wrong one in catering to what were thought to be public views that were ones that in the long run were going to harm the public; but I don't think it can be blamed on the participation of the public in the decision making.

MR. GRAVES: I didn't mean to blame that on the public participation process, but I was saying in response to the public views as Congress, for example, interpreted them, we do get into that problem. Another example, I think, is Congress's recent rollback of 2 or 3 cents on the price of gasoline at the same time the Europeans were raising the price by 15 cents a gallon.

MR. TERRIS: Let me go back to what I said. I think there are really two separate arguments for public participation. To me, the basic argument has nothing to do with whether the decisions are going to be better or worse. It is that the public has a right to participate and not simply through electing a President every four years and a congressman every two, that there is a basic right in a democracy to participate in a direct, active manner in decisions as they are being made. I would argue that, regardless of what the results were.

However, I do think the results will be improved. I do not think they will be perfect. I think they will be improved, not because the public is more often right than government officials, I don't believe that. I don't think they are probably either more often right or less often right. I do think that you get better decisions--I guess this comes from being a lawyer--I believe you get better decision making when you get the various sides strongly represented in the process. We know that private corporations are strongly represented. They may or may not be effective in a particular situation in achieving their goal, but they are always effectively represented. They have the resources and they have that representation. To me, you get better decision making if the other elements in our society which have an interest are also represented and the ideas, in effect, come out in the open and are thoroughly debated. That is my belief as to why you get better results, not because the results will always be reasonable, perfect, or an improvement over what we now have.

MR. GRAVES: In every administration, when there is a change of administration, the new administration comes into Washington with the idea of effecting changes that they feel are mandated by the public at large in its principal participation, the electoral process; and the first step, I think, is to try to impose on the bureaucracy some rapid change which effects the new policies, as the new administration perceived them. But all the requirements on advance notice and long-range planning really give you an inertia that lets the bureaucracy slide through these changes almost unmoved. Would you comment on that?

MR. TERRIS: I think that is a problem. The bureaucracy, of course, has long had methods of sliding through changes, of being unmoved even before citizen participation began to be developed.

I think you are right. I think citizen participation potentially did slow down decision making to some degree. I don't think it has to slow it down as much or as often as has occurred. I noticed, for example, the Chairman of the Power Commission cited to you the incredibly slow processing of applications and decisions before the Commission. Well, that occurred, of course, for the most part without citizen participation, and many of these decisions have gone very, very slowly without citizens involved at all.

I think a major effort has to be made to speed up agency decision making, and I think it can be done at the same time that you have effective citizen participation. I do not think that those things have to be diametrically opposed, but there is some opposition, obviously. It means you have to give some notice, some fair opportunity to be heard, but I don't think it means you have to wait years.

MR. KIRK: It might be helpful to this group if you were to discuss some of the principles involved in your effort to recover attorneys' fees under the Clean Air Act for your work in the Sierra Club case.

MR. TERRIS: The case that Alan is talking about is a case that we litigated ultimately to the Supreme Court and won, barely, four to four--which, as it happened, was winning--in which the courts held that significant deterioration of air quality would not be permitted in so-called clean air areas of the country. The Clean Air Act is one of the several new environmental statutes which provides for attorneys' fees, and we did ultimately recover attorneys' fees of slightly over $50,000, which sounds like a very large sum of money.

Some of the interesting things about how that occurred can, I think, affect the future of how easily citizen groups can get lawyers. The Department of Justice, at least at the District Court level, was very antagonistic to the payment of attorneys' fees, had all kinds of, I thought, rather silly arguments on why they shouldn't be paid. EPA fortunately, I think, resisted the Department as much as it could on that because I think EPA did take the view and still does take the view that the participation of citizen groups in court is very constructive and helps to achieve the enforcement of the Clean Air Act and the Water Quality Act, et cetera; but the Department of Justice was very recalcitrant about it, and still is, about most attorneys' fees situations.

For example, in an area which is not of direct application to you, but in which attorneys' fees awards are extremely important in enforcement of Federal statutes, namely, Title VII of the Civil Rights Act, the Department of Justice has consistently opposed attorneys' fees on every conceivable ground. It is almost a guerrilla action against them, of litigating, litigating, litigating and appealing to the Courts of Appeal and doing almost everything they could to interfere with what seems to me to be a rather clear Congressional mandate to use attorneys' fees to encourage litigation.

The other point I would like to make, which I think is quite important, is that in general the courts have been reluctant to provide what I think are adequate fees. $50,000 seems like a very great deal. It actually comes out--I think I would have to rethink this--but I think it comes out to about $50 an hour, which is perfectly adequate for public interest lawyers, in fact, is more than adequate. But the trouble is, what people forget is, that you have to assume you lose half your cases; and if you lose half your cases, you are being paid $25 an hour and that is not adequate to encourage lawyers to participate. So that is really a fundamental problem. The point of attorneys' fees provisions, after all, is to encourage lawyers to come forward and represent citizen groups so that citizen groups have the same opportunity to find representation as other people with more money.

MR. GELLHORN: You gave us an indication of some of the benefits as you viewed them of citizen participation. Can you outline what you think are some of the real costs and what are the dangers we might need to be concerned with and how to minimize them?

MR. TERRIS: The big danger is that you bog down the process so you don't get decisions. I do not think that society is served by making procedures so complicated that, in effect, decisions cannot be made with reasonable promptness, because in effect what happens when that occurs, is that the problems are getting worse and they may never be able to be solved. I think that is the overriding difficulty that is potentially possible for citizen participation, but I don't think that has to occur.

Let me give you an example from the Federal Trade Commission. The Federal Trade Commission does not say it will pay money to anybody who wants to come in. It says it will pick and choose among the groups that come forward. In fact, it even says that even if you have the money yourself to come in, it will not allow cross-examination from any group that wants to cross-examine witnesses. If it allowed any group to do it, you would have 30 different lawyers cross-examining a witness, and the net result is they would never finish. What they have said is we are going to choose an industry group to do cross-examination. If there are several different kinds of industry involved, we will allow different lawyers from them; we will limit the number of witnesses; we will make sure we are going to get to the end of the line on this. So what I am saying is there are a variety of methods available, I think, that allow procedures to be as fast as at present; but I think they are so slow now that even without citizen participation we have got to look at our agency procedures again to see how they can be speeded up; I think that is the big issue.

MR. GELLHORN: What about the money? The courts are clearly reluctant, as you indicate, to pay the fees. Is there a legitimate concern behind that?

MR. TERRIS: There is always a legitimate concern when there is taxpayer money. They ought to look carefully at how money is spent. The Trade Commission--again, this is kind of interesting because it involves again an agency type of decision--they started out with an hourly rate that--I believe I am right--was $19 to $27 an hour. A number of people, myself included, told them that although they might get us to participate in the first few that way just to see what was going to happen, they were not going to keep lawyers, not lawyers who had other potential business at least, to represent anybody at those levels. They are now proposing to increase that to, I believe, $20-some to $45 an hour, depending upon experience, and what have you. I think those kinds of rates, first of all, are adequate to attract lawyers and, second of all, are not extravagant to waste the taxpayers' money. I don't think the government should provide sufficient funds so the people can retain Covington and Burling at their rates. That is not necessary, and the same is true about retaining experts. They should not have to provide money that is comparable to what a utility would pay an expert. We can't expect that, but I think we can expect reasonable sums and I don't think we are talking about a major portion of the Federal budget. I think we are talking about a very small percentage of what an agency now spends.

MR. HARRIS: Would it be appropriate to ammend the Administrative Procedures Act and cut out the middle man and allow the public to participate directly; say, for example, let's cut out the lawyers?

MR. TERRIS: In what kind of proceeding are you going to cut out the lawyers? Rulemaking? Adjudicatory?

MR. HARRIS: There are people skilled in administrative procedures that are not attorneys.

MR. TERRIS: If you cut out the lawyers, you have cut out everybody's lawyer. You have got to start with that.

MR. HARRIS: Okay. What would be the impact of that?

MR. PAGLIN: Unemployment, to begin with. (Laughter.)

MR. TERRIS: Let me give you an example of something which I think you all ought to think about It does not involve energy, but it did involve a kind of administrative process. We represent a lot of people who are employees of AID and the State Department who have employment grievances. They have rather elaborate procedures in the Department of State for presenting those grievances to an impartial tribunal and they tell the employees, you don't need a lawyer. If you don't have a lawyer, we won't have a lawyer. I can only tell you that the chances of the employees' winning is markedly different if they have a lawyer and if they don't. Now, those are very intelligent people. They are well-educated people, and the procedures, in comparison to energy type of issues, are simple. I mean, they are vastly simpler than in the energy field, and yet it just doesn't work very well.

I think everybody ought to be skeptical about lawyers. I would encourage you to be so, but I would point out one thing. If there is anything a lawyer contributes to a proceeding, if there is anything he has learned or anything in his experience, it is to present the case for his client in the most forceful, persuasive way; and although I think there is a lot to be said for simplifying procedures and not letting lawyers perhaps be as dominant in them as they often are when we have such complex procedures, I think I would be rather leery about saying that we are going to have laymen present their case in very complex situations. I think that it sounds better than it will end up.

CONCLUDING SESSION

INTRODUCTION TO CONCLUDING SESSION

JAMES L. SUNDQUIST

The question has been raised repeatedly as to what the output of this workshop is supposed to be and what it will be. Frankly, we didn't know when we began, but it is perfectly clear now that we cannot attempt to arrive on behalf of the workshop at any findings, conclusions, or recommendations. What will come out of this workshop apart from the whole process of interaction and adult education which is an end in itself, will be a transcript of the proceedings; after a lapse of some time for editing and printing the proceedings will be published and distributed by The MITRE Corporation to each participant.

The panel of the National Academy of Public Administration that has been working with The MITRE Corporation in arranging this conference has been considering the possibility of putting out a report of our own based on the discussions here which might involve some findings, conclusions, and recommendations. That report would be issued only on the authority of the panel of the National Academy. Nobody who participated in the workshop would have any responsibility for it.*

Our panel this afternoon consists of our working group chairmen, and as you can see, it is as exquisitely balanced as each other panel

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*Editor's Note: This report has been issued and is reproduced in Appendix B of these proceedings.

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we have had during the last two days. We have a representative of industry, Joe Lieberman of General Electric; a representative of the environmentalists, Jeannette Brinch of the Conservation Foundation; a Federal official, Bill Brennan of the Federal Energy Administration; a state official, a chief state planner of the State of Connecticut, Lynn Brooks; and a researcher, Walter Hahn of the Congressional Research Service of the Library of Congress.

We have failed in our original idea of structuring this discussion this afternoon. It didn't seem workable, so each of the group chairmen will report in his or her own way reflecting the way in which that particular group went about its business.

BIOGRAPHY OF MODERATOR

JAMES L. SUNDQUIST is a Senior Fellow with the Brookings Institution. He has served in a large number of public service positions, including Deputy Under Secretary of Agriculture. He has served as an assistant to Senator Clark and to the Governor of New York State, and he has also held positions with the Bureau of the Budget. He attended Northwestern University and received a master's in public administration from Syracuse University.

REPORT ON WORKING GROUP V

CHAIRED BY
WILLIAM J. BRENNAN
FEDERAL ENERGY ADMINISTRATION

Being a good Fed, I am pleased to report in twelve minutes on what took five hours. I would like to compliment the particular group I was with. I think we had a wide variety of opinion in the group and we were still able to have five hours of what I thought was very good discussion with virtually no rancor. This is the first time I have seen it or attempted it and it seemed to work quite well. I think the basic caveat that we had within the group was that the time set aside for discussion was truly insufficient to fully address the fundamental questions, and with that I think we were able to then approach all of the questions relatively systematically and try to get some discussion on most of the points.

I think there was no question at all that almost everybody favored the fact that the public should be brought in, should be brought in very early, and that energy was certainly a topic that the public had a grave interest in and should be involved in at the earliest possible time. That "involved" in almost every case means the public being brought in at the earliest planning stage and at each stage along the way.

The group was well aware of the probability that having the public in at the earliest stages meant more likely that the public,

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if you will, as opposed to publics--which was really a topic of some discussion as there is no one real public out there, there are a whole bunch of publics--would have access to the policy process rather than meaningful input at the earliest possible stages. There was some significant discussion on the fact that if you had a 12-year project, that having the public in at the earliest possible stage did not in any way mean that the earliest possible input by that public would be meaningful in the sense that later input could come about. There was a real warning put out by the group--I think all parties, I don't think there was any real division on this--that if the public agencies invite the public in, if the companies invite the public in, there could be no expectation of a quid pro quo saying, hey, you have been in all the time, we won't have any of this eleventh hour business. Having the public in is having the public in because it is good to have the public in and not because you can foreclose eleventh hour discussions by particular interest groups.

I think that there was a relative consensus that the agencies involved and the companies involved meant that they have a pro-active responsibility. There were obvious caveats witn a case that we were not discussing particularly, and that is the energy parks case in Pennsylvania, but there was still general consensus that the public body and the private entity had the real opportunity and responsibility for going out and making a concerted effort to educate the public. This does not mean that, again with some caveats and some very clear ones, educating the public is completed by issuing a press release and throwing it up in the air and hoping that it will land in the proper newspapers or anything like that. It means a concerted effort to go out and find those publics, to keep them informed at every step along the way. We didn't get into techniques too much but clearly one that was addressed was having mailing lists for local interest groups, e.g., the Audubon Society, and all the other groups that are known to be there--and it is the responsibility of the parties to go out and seek them, tell them what is being planned on--and getting out with the word in that regard, and keeping it up through the entire process.

We had an easier time with utilities cases. I think that bringing in the public at the earliest possible time in utilities cases was easier to make. Here you are talking about bodies that have some public protection and public responsibility. When it came to those cases, therefore, the public should be involved at the very, very early stages in those cases.

Now, when it came to non-utility cases there was some feeling that it was more difficult to address the question of public participation prior to the time of application, but in utility cases it was felt that the states, the agencies, and the utility companies had some real responsibility for going out and seeking public input.

We believe that there are times when not having the public in at the earliest possible stages is conceivably in the public interest; we didn't exhaust this, but we did find some examples. Now they may not be valid but at least they were thrown around in our group and not particularly challenged, but we felt that there were some cases. One that came up was one in my own agency in which we have a strategic storage program requiring considerable land acquisition; too early-on release to the public of site-specific information could result in speculation or other activity that is not particularly in the public interest, so I think that there are cases--and we didn't get into clear definitions--I think there could be a clear case made for certain types of activities being kept away from the public at least at some stage. But the clear intent of the group was that the public be brought in at the earliest possible moment.

Again, the finding was that in the utility cases that public participation should be very early, prior to the application and during the planning process; perhaps in the other cases mentioned, such as shale cracking, or something like that with high technology, that it is probably at the time of application, and in some cases where the public body is going out and making some actions, there may be a case for keeping the public out at that particular stage.

With regard to question two, we felt that that was basically covered in question one. There were some general discussions on that point but we did mingle the two questions. I think the big point in there was, there were some techniques that could be utilized. Again, I understand that other groups exhausted this question and we did not, so we will just say that there were some points made about having independent observers early on in the hearings of such utilities, such as the League of Women Voters or other local groups that probably are looked upon as having some standing in the public community out there, and using them for that type of thing or the development of the ombudsman concept at some particular point by the agencies and/or private entities involved.

With regard to the third question, we thought the first part of it was somewhat irrelevant, having FEA, NRC, the Detroit Power Company and so on telling Mary Sinclair how she could improve her techniques in public participation, so with that we will go in to the next part.

With respect to how representative should an intervenor group be, I think there were cases made by some of our legal friends on the panel that the law is rather clear or at least--I am not a lawyer so I don't want to get into a big discussion on this--that anybody who is actually impacted by a particular case has an interest, and an interest group of one is probably not too small.

So as far as how representative an intervenor group should be, they can represent as limited an interest as those of one person and probably be considered legitimate, at least as far as I got the sense of our particular group.

On the question of Federal funding, we had an expert in our group who knew a considerable amount about the history of this and he gave us a rather detailed sketch of where we stand now, so let me discuss this from a couple of points of view.

There were people on the panel who do not favor funding of public interest groups. I think, by and large, the group can be said, even those people that represented the most private--if you can divide public and private and private and public in all these questions as we have the past couple of days--I think those people representing what we would classify as the private interests were somewhat opposed to this concept, whereas the other people, including, I guess, the government people, were pretty much in favor of it, and certainly the people who represented what we would call the public interest groups here were for it. But I think the big thing was that even those people on the private side recognize the trends were already going in that direction, that the decisions of the General Accounting Office and Comptroller General, and in other regulatory agencies involving non-energy activities and in the energy field, were going in that direction; that already the NRC has the authority and can fund some agencies, but there is discussion by the agency that the difference between "can" and "must" and all of these things have to be decided. But I think there was a general feeling that funding was going to come about; on that there is very little question within our group.

Then there is the question of who is going to qualify and how, and we had some discussion of S-2715 and the explanation of the basic provisions of how you would fund a particular intervenor group and things of this type. I think that the group clearly recognized that even if the particular provisions of S-2715 are insufficient, that you could define ways of getting to that particular question; again, if the specifics of S-2715 aren't acceptable to the group, there was no problem on the part of the group in saying that such definitions could be made.

Then we went into the fourth question, to what extent should energy decisions such as site selection be made through state or regional planning process rather than a legal adversary process. There was a clear recognition on the part of the group that planning is indeed adversary in its nature; and that having people come down and having them testify, the nature of this is somewhat adversary although not trial adversary, if you will, as opposed to hearing adversary.

Again, I defer to my legal friends, but I think there was a clear understanding that planning is an adversary type of relationship and that making it more effective will be useful but in no way forecloses the need for interested parties to go into the courts or the political direction. I think the big thing that everybody felt, in summary, is that early public input is good, but it would in no way speed up or slow down the process necessarily, and that streamlining of the process involves much more than public participation. I think the big words that were thrown around in all of these public inputs and representations were "credibility" and "confidence."

BIOGRAPHY OF CHAIRMAN

WILLIAM J. BRENNAN has been Acting Deputy Director of Intergovernmental Relations and Special Programs at the Federal Energy Administration since June of 1976. Prior to that he served as FEA's Director of Regional Operations. He is a career employee with more than 19 years of Federal service. Much of his experience relates to managing regional offices. Most recently he was a Regional Representative of the Office of Management and Budget. Prior to that he was an Intergovernmental Affairs Representative for the Department of Housing and Urban Development. He also served at HUD as a Program Manager for regional activities. He graduated from Boston University and has done graduate study in public administration at George Washington University.

COMMENT

MR. OLSON: I am Marv Olson from Battelle. I want to add one or two things to Mr. Brennan's report.

We spent a fair amount of time this morning talking about the fact that increasingly, issues and decisions and policies that in the past have been treated by agencies or utilities as their own private business--a purely technical decision or an internal house kind of decision--are being seen as topics for public discussions, because they are essentially [public] policy issues or have [public] policy implications. Consequently, the theme that I felt was stressed perhaps most strongly of all is the need for a constant flow of communications, because there is no way that the public is going to be able to discuss or to challenge any of these decisions if they are kept in-house. The particular case that we were looking at, Big Rock, was a perfect example of this, in which the decision had to be forced out into the public arena.

I would just want to add a brief sentence on the importance of making public, information about all kinds of decisions and policies that are going on within agencies, utilities, and so on, and the very strong emphasis we gave to doing this communication role in a proactive way--not just making the information available to the public, but as Bill stressed, going out and giving it to any group that might potentially be interested in it.

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REPORT ON WORKING GROUP III
CHAIRED BY
JEANNETTE BRINCH
CONSERVATION FOUNDATION

As organized as Bill's group seems to have been, our group was just as disorganized. We started out last night by asking some basic questions such as, what is public participation, do we seek early public participation or greater confidence in decision makers or both, and when should the public be involved.

In trying to answer those questions, we asked even more questions. We had a very difficult time in finding answers. We asked if a more effective process for decision making in the nuclear process would be to substitute a more credible agency than the NRC. Can we develop incentives to be more responsible? In the area of funding intervenors, will their position be enhanced with funding or will it be suspect? Will they have been co-opted? Do we restrict the notion of intervention simply to nuclear licensing and citizen litigation to force responsible decision making in that area?

Frustrated by all of these questions and the difficulty with finding answers, this morning we came up with a set of recommendations which deal primarily with planning as an open process through which people might affect the outcome of the process. The group felt that the lesson learned from the North Anna project--we were the North Anna group--was that preliminary planning and decisions based upon

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VEPCO's planning process were not open and that the North Anna Environmental Coalition learned much too late of the utility's intentions and got involved much too late.

Our first recommendation is the formulation of a planning program by each agency involved in energy decision making which would be open for review by the public.

Our second recommendation is that that agency might involve the public in this planning process in the following manner: first, by the review and comment at the earliest possible time by state and regional levels of government; and second, by review and comment by other agencies and by review and comment by the public. The public is also responsible, not just the agency, for involving the public, and this means that they must forcefully get involved. This obviously takes opening up the informational channels, it takes money, it takes time, and so forth.

The issue of funding intervenors is the subject of our third recommendation. It was felt that the process should be opened up enough so that adversary hearings and the whole issue of funding intervenors isn't necessary; but on the other hand it was agreed that this process change was far from happening and so we might just as well think seriously of funding intervenors. We had a lot of discussion on this issue and we tried to take a vote, as foolish as that may sound, and we did not come up with a decidedly pro or con kind of balance.

Our fourth recommendation is that specific measures to open up the regulatory process be taken. First, lobbying by public interest groups should be legitimized as the current bill before Congress provides; second, complete and open communication channels should be developed between public agencies and the interested public. These two things sound very grand and very nice but, of course, we did not go into how it gets done. Many people in the group had been struggling with the same question for years and we just weren't able to come to a consensus.

We recommended a number of measures for further study. One, perhaps the state or the Federal agency involved in making a particular decision on an energy facility should conduct participatory proceedings in a specific state or region. That is, the agency should experiment with various public participation techniques using the real issue in a state or region.

Two, we recommend that Federal support should be given for state and regional energy planning efforts similar to what is being done under EPCA for conservation but in a broader manner, including all kinds of energy related decisions.

Three, we recommend that people's counsels or ombudsmen should be appointed in Federal agencies to be responsive to the public's concerns and we recommend for study that full participation should be encouraged in the selection of members of advisory boards and hearing panels in public agencies and in regulatory bodies.

BIOGRAPHY OF CHAIRPERSON

JEANNETTE BRINCH is Energy Conservation Coordinator of the State of Idaho. She has served as associate program director of citizen training for energy conservation and water quality decision making with the Conservation Foundation. She is a graduate of George Washington University.

REPORT ON WORKING GROUP I
CHAIRED BY
WALTER A. HAHN
CONGRESSIONAL RESEARCH SERVICE

Group I conducted two lively and productive sessions. The makeup of our group varied in that we had plenty of public interest group representation, discussion, and enthusiasm in last evening's session but no such members were present at this morning's session. This flavors the nature of the report I will give on our group. We did not have any major differences of approach or value sets in the second (this morning's) session and thus we missed the spirited interaction of yesterday and the personal dynamics that meeting produced.

Where possible, we tried to identify areas of reasonable consensus, i.e., where there was more agreement than not. We also tried to identify areas in which there was disagreement, but at least we knew about what we were disagreeing. In other words, the knowledge, the assumptions, the institutional forms were there and while we might have some semantic problems, we at least knew what we were talking about but didn't agree at all. And finally, we tried to identify some areas for research, experiment, or areas of ignorance where we didn't know whether we were disagreeing or not because we frankly didn't know what we were talking about. There were items in all three categories as you will see in a moment.

We really have to report in this group on almost two separate meetings because, as I mentioned, some of the people that were with us last night did not join us today and today we had a few new members. Last night we raised a number of questions at random, and hit each rather rapidly with questions and opinions. We all did some posturing--as academics, as public interest group representatives, as members of the establishment--and thus got most of the personality and organizational preliminaries out of our system yesterday. Today, we highlighted some general issues or "major problems" as we called them. We went around the group and asked each participant, "What is the big problem in this thing called citizen participation?" Note that in keeping with the general emphasis of the meeting we focused on process, not the substantive case details.

Without identifying who stated which problem (which would not be a fair game according to the rules at this workshop), one of the major problems identified with the larger process called participation is the lack of trust. Involved were both lack of trust in each other and the lack of trust in our institutional forms. This "finding" pervades a lot of the other points that we highlighted later.

A second major problem was the lack of incentives, and in some cases techniques, to look at the very long range aspects--the future aspects, if you will--of problems that are pressing upon us today. Combined with that, we lack incentives to look at future problems that are not pressing on us today but will or might sometime later.

A third issue is that the incentives to think bigger and broader than the situation at hand are not built into us or into our institutional forms to the degree where we behave this way as a routine matter. Thus, coupled with the point above, we instinctively discount both future time and long distance.

A fourth broad problem, one beyond us as individuals, beyond our institutions, beyond our specific interest areas, is that while we use the label "public," sometimes the public we are referring to is, in fact, quite a narrow segment of society. Does "public" sometimes mean "limited public" or even, "special interest," albeit a grass-roots citizen-based one?

Another of the problems identified is that of lack of policy guidance. The example most frequently given is, we do not have a national energy policy for guidance in specific hearings, in making regulations, or in trying specific cases. This in turn causes secondary problems because in the absence of agreement on broader subjects such as goals and values, often the cases, the regulations, or the incidents are used as devices to attempt to make policy or to influence policy.

We postulated early in the session a possible overriding assumption, and then attempted to see how many in the room agreed or disagreed with it and what influence this might have on the process. The assumption was, simply stated, that participation is a right. There was consensus that discussing the notion of whether there will be participation or not was not a feasible discussion. The alternative, of course, is the attitude that participation is a privilege, or some similar notion, granted by the institution to those who have a disagreement with whatever is going on. It was noted by some of our participants that there is no explicit identification of regulation and participation in the Constitution but there is little doubt there exists an inherent right to speak up as a citizen with no reason to justify why, if it is a sincere and, of course, a relevant intervention.

We raised and discussed another very serious question, also concerning the broad process of citizen participation, intervention, or whatever. Can the same process deal simultaneously with three types of situations? Situation one concerns the technical-judgmental type issues, those gray areas where one chooses a level of performance. Speed limits were used as an example from this platform yesterday. Secondly, the issues of rights, yes or no issues. Thirdly, either participation for its own sake or participation for the symbolism that, in fact, the public was present at the hearing and "they had their say." Implicit in the question is that perhaps the institutional forms and the procedural mechanisms of dealing with these three types of situations need to be different or at least modified for the cases as brought.

On the first type, the technical-judgmental issue type things, there was no agreement that the participative legal processes really work. There is no agreement what else works either, I might add. On the second one, the issues of rights, or yes-no issues there was consensus that our sixteenth century (presumably updated) judicial system has served us well and continues to serve us well. Many but not all felt it will continue to adapt and deal with all new situations. The comments on the third class, participation for its own sake or as a demonstration activity, indicated that while it sometimes occurs, the participants at this meeting considered it a farce and set it aside. There was, however, the nagging, unspoken implication that there were some bureaucrats and private entrepreneurs that still viewed citizen participation only in this cynical light.

Several proposals were made about the "participation system." One of them was that what we needed for the citizen participation process was a new and independent adjudicatory agency or mechanism and that this would be separate from the regulatory agencies of today. As I will mention later, some referred to it as a "super agency." This would be the institution to which the intervenors would take their issues and which would be outside of the extant rule making regulation processes themselves. The second element of this package of proposals was that there ought to be some independent scientific and technological expertise and information be available to intervenors or "public participants." There ought to be access to resources, to information, to advice, by intervenors and others upon request. I wouldn't be forced upon them, but it would be available to them. A third item is that early notification of initiation, whether it was a rule making, or hearing or other process, was very desirable, even necessary, for constructive participation. The fourth element suggested was that access to information should be made early, not late in the process--the avoidance of the eleventh-hour syndrome, if you will. The fifth topic was on financing, which we will come to later.

Let me next identify some of the issues that I mentioned on which there was more disagreement than agreement. Please note that we did agree that these were issues. One was that the battle between the intervenors and "the establishment" is an unequal battle. Among the inequalities are the levels of expertise, the degree of organization, sometimes the lack of true representation, biased representation and funding, and the degree of enthusiasm behind a group. Participation was characterized as an unequal contest between the haves and the have nots, or the ins and the outs. The unequalness also was noted in the resources applied, in the type expertise that was available, and in the information that was available. There was fair agreement that whatever were the causes of this unequalness, this was not a desirable situation and should be righted in the public interest, in the intervenors' interests, and in the defenders' interests.

A second issue was how and from what source the funding for supplying a more equal set of resources should come. There was no agreement as to how this should be brought about, but it was definitely an issue and one that has to be faced.

A third so-called issue is the criteria for participation. Was the system (as has been mentioned in plenary session) of the Federal Trade Commission, which, in the opinion of some, sets fairly high and specific hurdles to climb over, a better way? Or was the more lenient system of the Nuclear Regulatory Commission, where if one shows reasonableness and relevance and a few other elementary qualifications, the right to participate is nearly automatically granted, more preferable? There were no acceptable criteria to the many parties of our discussion but the tone of the discussions leaned toward a desire to develop more explicit standards.

Another set of issues had to do with the institutions involved in the citizen participation process. Some urged a "super-agency" or at least a new separate agency. Some wanted, instead of adding more things, to fix up the existing system: improve the NRC processes, improve the FTC processes, et cetera. It was also observed that if one looks back at the broad process, rather than just a regulatory or just a site-specific hearing or some other process, there are now a great many hurdles, each where something can go wrong. There is an EPA hearing, there is a state hearing, there are other types of Federal agency hearings. Even if at each step in the sequence of decisions the decision is made "right," suddenly one can be made "wrong" and destroy the whole issue from the standpoint of one or the other parties. In other words, what exists is an unstable, partially capricious participation system that cannot be counted on by any of the parties always to be just, equitable, and final.

Lastly, the group agreed with some of the remarks made in yesterday's plenary session that the citizen participation system is in trouble. In doesn't work. To some it was a mess. To others it was unworkable or imperfect. To many, too ad hoc. Recall that in this group consensus, the public interest groups were not heavily represented in the second part of our discussion. There was a clear feeling that some of the problems of "the system" were due to the previously mentioned lack of trust. They were also due to a lack of orderliness and timeliness in the procedures that were available. Some were free to admit (this refers more to yesterday's evening session) that, "The process is no damn good if it doesn't give me the answer I want. Whatever my interests are, if I don't win, it is a lousy process."

Another area of consensus is that the public advisor proposal made earlier is probably a good idea and should be tried as an experiment. It was noted that the State of California already has an advisory process that is available to people in an intervenor situation. The group agreed that this should be tried and expanded in a variety of forms but we left open as to how it should be funded. Nevertheless, it was also agreed that experiments should be conducted on various types of funding, and with various levels of funding. It was generally felt that sufficient statutory authority and funds were available in existing institutions to conduct meaningful experiments. In almost all cases there was agreement that there should be some degree of matching funding; that those receiving the funds should have to put up some resources from another source than the public or than the opposite side. Experiments should be conducted using varying funding sources.

In other words, types, levels, and sources of additional resources should all be experimented with. Even people who stated they were flatly against one or the other type of funding agreed that the experiments would be a very fine thing to try for a year or so. We even had one dramatic event where one participant offered to sign a statement agreeing to experiment and to hand it to one of his erstwhile "enemies" to show his good faith on this point.

There was strong agreement that early notification and early access was very desirable and necessary, if fairness was to be done to all of the parties.

The final point on which there was consensus is that the policy process behind these intervenor incidents is deficient. Various legislatures at Federal and state levels have failed, in the eyes of many, to provide a frame of reference in which these hearings and other processes can be conducted. The goals, values, style and plans are not clear, and that cannot be cured by even the best of participative processes.

Early in our group we decided we would not stop and define terms explicitly. This was not because it isn't needed--it is needed desperately--but because we felt we would never get onto more meaningful discussion of "the process." Clearly the term "public" participation is erroneous in most cases. "Special" interest carries unnecessary negative connotations and is equally vague. We used "citizen" participation as an unsatisfactory but useful handle, but the need for more adequate and acceptable terminology is clear and pressing.

That is about where we ended. I think we could have, like many of the other groups, gone on and discussed these matters for quite a period of time.

BIOGRAPHY OF CHAIRMAN

WALTER A. HAHN, JR. is a Senior Specialist in Science and Technology at the Congressional Research Service at the Library of Congress. He has held several policy advisory positions at the Department of Commerce, and he served on the National Goals Research Staff of the White House in 1970. He attended New York University and earned his master's at the American University. He is author and co-author of several books and articles on technology assessment, national security and policy planning.

REPORT ON WORKING GROUP II
CHAIRED BY
LYNN ALAN BROOKS
CONNECTICUT DEPARTMENT OF PLANNING & ENERGY POLICY

I would like to start out with a visual impression of the group dynamics, but if I start crying at this point, I probably wouldn't finish, so I think I will leave it to a verbal description of what went on.

We were in the situation of having most of the same actors both last evening and today. Maybe it was the effect of the immediately preceding cocktail party last night, or the fact that people were up late and were sleepy early this morning, but there was a difference in the tone of the two sessions, although many of the same subjects sort of came around and back at us. At least they did it in such a way this morning that the decibel level of the discussion was lower. From the chairman's point of view, it was certainly a lot easier in controlling the group in the sense we didn't have so many people trying to interrupt each other, and so forth.

If you infer that we had a very lively group, it is very true. I think I have never been chairman of a group that contained so many intelligent people and so many people who were of a single mind, and, perhaps, with so many people of diverse viewpoints who seemed to have come for the opportunity to convince the fence sitters or people who hadn't thought through the process of their own point of view.

There was a definite lack, I think, of willingness to try to reach consensus, due somewhat, I think, to the fact that this case is

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still in litigation, and that the sides are in fact still drawn and I don't think that that is always a good idea to do that in this kind of a workshop. Perhaps more could have been achieved with some of the same people with some other case study, rather than this one.

We ended up the meeting last night by listing problems that we thought there were with the process, particularly as it applied to the Seabrook case. I am going to run through some of these problems. I just want you to recognize that the only way we seemed to be able to function at that meeting last night was to go around the table and ask each person what they thought the major problem was, so some of these things do not represent consensus of the group, but they represent different thoughts that came up in that discussion.

The first was that the process was too long and had too many duplicate parts to it. The second was that the public participation came too late in the process. The third one was the inability to raise real issues, primarily because they were excluded by the process itself or regulations under which the process was conducted including constraints of time and money. Fourth was the lack of institutional processes including such things as national energy policy and again, the framework around which these decisions are made. Fifth was the inappropriateness of the adversary process to make certain kinds of decision. The sixth problem was that the hearing boards are not being recognized as being independent. The seventh was the lack of honesty within the whole process. And the eighth, which ended as we broke up, was that you can't please everyone through any process.

So, using that as a springboard for this morning's session, we immediately abandoned it and sort of ended up focusing strictly around a much more narrow issue, that being the issue of funding. I think we did that primarily because as a group we seemed unable to wrestle with anything else. We spent most of the time talking about the funding issue. Believe it or not, we actually reached agreement just before we broke up. I won't say consensus. There was agreement that progress could be made in this whole area of the adjudicatory process by tying streamlining of the process to funding.

That is the level of detail we could get an agreement on. There was within the group, however, a strong sentiment toward a more detailed expression of that. I would like to just go through that although there was not complete agreement. The main aspects of streamlining that the group was really talking about were such things as getting rid of the duplication in the process, limiting the kinds of issues that are placed within the adjudicatory process and strengthening the ability to handle things through summary disposition. It was recognized within the group that summary disposition might be more of a problem with the judicial system and specifically the appellate courts, than you could ever accomplish through any kind of administrative or legislative kind of rules.

On the side of funding, the two points that seemed to be relatively clear were that the funding should be made available, particularly for unique issues that were not being raised otherwise, or unique vantage points on issues that were being raised otherwise, and that there probably should be some economic need kind of test. It was pointed out that this is essentially the thrust of the Kennedy Bill in one form or another. And it was also pointed out that certain of these aspects are very similar to some of the other models that are being used by other regulatory agencies currently.

A strong theme that was concurrent with this agreement reached by the group was that the adjudicatory process is really but one part of the total process. And even if you solve the public participation in the adjudicatory process by going this kind of a route, i.e., the funding and streamlining kind of compromise, that does not preclude and cannot preclude effective public participation in the rest of the process. There are other areas in which the decisions are better made by other forms of decision making, and each of them must have its concomitant public participation if we are going to be effective.

I will take a little liberty as chairman to say that my own point that I tried to impress upon the group was that if you are going to concentrate on education as one aspect, it would be my personal view that the education should be related more to our institutions in terms of getting them to accept and to utilize public participation rather than concentrating on trying to educate the public to get involved, because I think the main problem is in fact sort of an institutional bureaucratic type of problem.

Again, I feel very comfortable up here giving this report only because I know we are going to allow anyone to stand up and say that there are other slants on the group. I would just say that it was a very interesting kind of group, and although I had the reservation about including a pilot project or a case study like this that is still in litigation, it certainly does make it exciting. There were times when you could close your eyes and feel almost like you were the hearing officer back in Seabrook listening to argument concerning the credibility of a particular witness and trying to make that decision. It was very exciting, but I have some real reservations because I think it puts severe constraints on some of the primary protagonists in terms of how far they could really go in terms of discussing the issues completely. I think after the fact you might be able to go into it a lot deeper.

BIOGRAPHY OF CHAIRMAN

LYNN ALAN BROOKS is a graduate of the U.S. Naval Academy where he received a degree in engineering. After serving in the Navy as navigator and weapons officer, he earned a law degree from the University of Michigan. From 1971 to 1974 he practiced law with the Hartford, Connecticut law firm of Murtha, Cullina, Richter and Pinney. During that time he served as General Counsel to the Connecticut Resources Recovery Authority. In 1974 he was appointed Connecticut Energy Administrator, and in July 1975 he was appointed Commissioner of Planning and Energy Policy.

REPORT ON WORKING GROUP IV
CHAIRED BY
JOSEPH A. LIEBERMAN
GENERAL ELECTRIC CENTER FOR ENERGY SYSTEMS

I am from General Electric Company, but I am not representing an industrial viewpoint. What I am trying to do, in as objective a manner as I know how, is to relate what took place in our group. I might say that any attempt to state in some succinct manner the results of our deliberations, I approach with great humility and perhaps even a little frustration. I would hesitate to characterize any of these observations, as I will call them, as consensus views, without trying to define the word consensus, although I think there was some general agreement regarding some of them. I don't think there was anything that happened in our group that is significantly different from what you have heard from the other groups already. We did have what I consider to be an outstandingly competent, articulate group of people, that really represented the entire spectrum of actors in this whole issue of public participation and the agencies that are involved.

There was, I think, a general theme that went through our discussions last night. I had the same experience, I guess, that Lynn did, that at the end of last evening, I didn't know what we were going to end up doing this morning. Either there were some tranquilizers in what they had or what not, but it went a lot better this morning than I thought it would when I left last night.

The general theme that went through our discussions was that there should be public participation, obviously, but that the intervenors should have the wherewithal to present their case in the best possible manner. This meant presenting their case at the earliest practical time, with full and complete access to relevant data and information, at different levels of government, that is local, state and Federal, and both with respect to policy decisions, which might involve legislative bodies more than other kinds of agencies, and at what we call the project level, where the regulatory agencies are perhaps primarily involved.

The extent of this public participation--I think this is saying what Walt said in a different way--is as extensive as the public might demand. Our group, I think, felt generally that there were no aspects of the decision making process or specific decisions, no matter at what level, from which the public should be excluded. However, where proprietary corporate matters, national defense, or the foreign policy dimensions of issues are involved, the avenues of public participation indeed might be limited. The latter, of course, is subject to control by legislative bodies and at the Federal level by Congressional actions and Congressional oversight.

The information and education requirements to improve and to upgrade this public participation--and this was something I think was made quite clear in our group--relate not only to the public, but to the governmental institutions as well; they can stand some education as to the methods and the scope and nature of public participation. This would involve, from an information standpoint, much wider use of the media and of information dissemination institutions and organizations, for example, extension services, in addition to the information-type meetings that are sponsored by various groups--the public interest groups, government agencies, and the private sector. There should be a broad spectrum of information dissemination by the various actors in this kind of operation. It was quite obvious that the legal type advertisements and notifications and publications in the Federal Register and Congressional Record are not adequate. The statement was made that there should be a wide application of the Freedom of Information Act.

However, in connection with this whole question of dissemination of information there was a concern expressed about information overload. One of the participants pointed out that if we would make wider use of television, we could take up 12 channels and be watching it all the time if you really tried to carry this too far.

There was a need expressed for greater outreach by government agencies, but there was a caveat that when an adversary proceeding is involved or when you reach this stage, care had to be taken that the due process requirements for the parties involved were not violated.

The effectiveness of the techniques by which intervenor groups organize and conduct their operations was felt to be largely a function of an ability to recognize the scope of a particular issue and the information needs to adequately address the issue. So this goes back to the point of the information requirements and also the question of what constitutes a representative intervenor. Here, too, we concluded that an individual who could give a competent presentation and has done his homework is perhaps more effective than a large group that has not done its homework and makes an inadequate presentation of its case.

As far as the techniques that might be involved, whether court cases or advisory bodies, it was generally felt that different situations required the use of various mechanisms for public participation, whether they be court suits or open meetings, and so forth. All of them under certain circumstances would have to be used.

The concept of a public advocate was brought up and discussed briefly, but it was, I think, made clear that this should not be considered as a substitute for intervenor group activity. Indeed, the idea of a public advocate agency with appropriate legal and technical staff is something that perhaps should be explored.

With respect to the funding question, we did not explore that in great detail, but the comments were made that the funding might well come, that there should be some funding mechanism, and that this was obviously coming, but that the funding might be coming from the federal government or state government or from the applicant. In other words, there might be a variety of mechanisms for accomplishing the funding. There was also some comment with regard to whether this funding should be on a case by case or case specific basis. There seemed to be some inclination in that direction, but not at the exclusion of a mechanism for some sort of continuous funding of intervenor groups.

BIOGRAPHY OF CHAIRMAN

JOSEPH A. LIEBERMAN is Manager of Environmental Analysis at General Electric's Center for Energy Systems in Washington, D.C. He joined General Electric in 1973 following 20 years of varied Federal service with agencies including the Atomic Energy Commission, the Department of Health, Education and Welfare, the Environmental Protection Agency and the Congressional Research Service.

He received his bachelor and doctorate in engineering from The Johns Hopkins University.

DISCUSSION

MR. SUNDQUIST: The floor then is open for general discussion. Does anybody have a reaction to the entire conference or to the presentation of these five reports? I sat for a time through the five meetings and I must say there is no question about who had the hardest job in this conference. All the rest of us had to do was speak our piece, but these five people had to reconcile, harmonize and synthesize and that was no small undertaking.

MR. STETSON: My name is Fred Stetson and I am with the Atomic Industrial Forum. I am very interested in the concept of tying streamlining of the process to the funding of intervenors, but I also recognize the realities of being unable to establish a fixed schedule for the compilation of a complete record and for the decision making process itself. I would like to hear Mr. Brooks and perhaps Mr. Lieberman address that issue in a little more detail.

In addition I have one comment. I think that this conference ought to be made more aware of the heavy-handedness that was engaged in by Mr. Myron Cherry and incredibly approved by the organizers of this conference concerning the journalistic rape of Mr. Sawicki's manuscript on the ECCS hearing without his knowledge or approval. This action was taken under a deadline because Mr. Cherry refused to come unless his changes to the manuscript were made. This action amounts to censorship; it negates the disclaimer at the beginning of the report; and it, in my view, also encourages the continued obstreperousness of Mr. Cherry. I am not surprised at Mr. Cherry's actions, but I am disappointed that the conference organizers agreed to change the manuscript without the knowledge or approval of the authors.

MR. SUNDQUIST: Well, on behalf of the organizers--I was not personally here when it happened--but they had to make a quick decision and the decision was whether to alter the text of Mr. Sawicki's draft or lose the participation of Mr. Cherry, not to mention the possibility of a suit which he had mentioned. I don't believe they were intimidated by the suit, but they were afraid that without one of the leading actors in that particular case, it wouldn't be much of a play. It is like pulling out the lead character with no understudy ready.

The damage has been done to Mr. Sawicki, and I agree that he has been damaged. There should probably have been a footnote of some kind saying that it had been done. We did our best to amend it after it happened. In the course of editing and getting the case studies ready for further distribution and publication, if they are published, this matter will certainly be gone into and some kind of negotiated solution, I hope, will be worked out.

MS. SINCLAIR: I object to the very lurid type of language with which Mr. Cherry's objections to some parts of the document were characterized. I have asked what those changes were and they amount to the fact that Mr. Cherry said he would do anything, and he wanted it added, "within the framework of the law," to stop the nuclear power industry. Within the framework of the law was an essential part of the statement that he had made, which was deleted by Mr. Sawicki, and Mr. Cherry found that offensive, since he is, above all, an officer of the court and a lawyer. Since there are some actions contemplated now in the nuclear power opposition, he wanted to make sure that it was clear that "within the framework of the law" was the true way in which he was interested in opposing nuclear power.

He also added the last two sentences in the abstract which addressed themselves to the purposes of this conference and that is to consider the funding of participation. Those two sentences are these: "A primary lesson emerging is that without additional financial aid, public participation is frustrated. Such aid, in light of the demands of the NRC, probably should come from the regulatory agency itself." I do not see these as lurid rapes of any particular piece of writing.

I would also like to say, as one of the founders of the emergency core cooling system safety hearings, that fact that the people who founded it were not consulted by Mr. Sawicki I think is the greatest omission.

MR. SAWICKI: I think the point is rather obvious. The paper was written by me. It was not written by Mr. Cherry. He was not given the job of editing my paper with my knowledge. The changes were made without consulting me. My name is on the paper. The additions to the abstract are Mr. Cherry's ideas. They are not mine. Now, I might agree with those ideas, but the point is that I did not put them there.

I would also like to say something else, which is that the previous speaker understates the extent of the changes that Mr. Cherry made. He added two sentences to the abstract. He did revise the quotation that you mentioned, but if you will look at the addendum that you were handed at the beginning of this conference, you will see that there were many other changes made without my approval. I think if this manuscript was going to be printed, it should have said, "by P. Sawicki with amendations by Myron Cherry."

I would like to say one more thing. I don't claim that what I said was necessarily right or necessarily wrong. The point is that you don't go around fussing with other people's work behind closed doors like this. It seems to me that Mr. Cherry, who has spent several years now complaining that he has been muscled by the Atomic Energy Commission, is guilty of the same thing when he muscles someone else. Thank you.

MS. WEISS: I think you are perfectly right to be upset about your manuscript being changed. I hardly think that really needs argument. I am curious, though, because one of the changes was in a purported quotation by Myron Cherry, and I am curious which way he said it to you, the first way or second way?

MR. SAWICKI: I put it in the manuscript the way he said it, the first way.

MR. KLOMAN: I accept the responsibility fully for having made these changes, and I understand perfectly how Phil feels about it. In hindsight, I can see that this was not the way to have made the changes. They should have been made as a footnote reference.

The fact is that the papers were due to go out of MITRE to the printer. He called me beyond the deadline for letting them go to the printer and I was under pressure. That is not an excuse. I offer it only to explain what happened, and the best we can do at this point is in the record, when the cases are issued, to have the changes made in the form that they should have been made in the first place.

Let me add one other thing. All of the cases were sent out to the people who were going to be involved in the program in the presentation of them. Everyone had a chance to make a comment or change. The only person who availed himself of this was Cherry, and as I say, it was a last minute thing; but there were no other changes made.

MR. BROOKS: Might I suggest as another alternative, to present both versions. I think in some degree it insults the intelligence of this group to say you are going to make the changes unilaterally.

MR. SUNDQUIST: Perhaps this completes the record on this particular point.

MR. KLOMAN: Glen Graves has just made the point that people were given the opportunity to suggest changes, not to make them and that is the way it was.

MR. DIGNAN: I guess my problem with what happened here is that in our case study, I was interviewed. I was interviewed with the full knowledge that I was talking freely to someone who was going to write the case up, and no human being can write dispassionately no matter how hard we try; and I played that game that way. There are certain things in the case study that if I had the editor's pencil I would change, but I sort of thought I had gone into this game that way and I am disturbed that MITRE, whom I know well and think highly of, allowed this to happen in one case.

All of us who talked to these writers, who, in my judgment, did an extremely good job, are perfectly capable of getting up and defending ourselves if we think we have been misrepresented. I figured that was the name of the game here. I did not think it was the name of the game that one person who was in this act got the chance, especially without the author's okay, to change it. I think a mistake was made. I do understand that it was made under pressure and I think it ought to be acknowledged in the final record in this thing--simply because there are things in my case study I would like to have changed, but I didn't try.

MR. SUNDQUIST: I think the mistake has been acknowledged. You all have the addendum that Mr. Sawicki gave us. If you will insert that in your book, it will take care of this very limited edition. In the next edition which will be circulated more widely some modifications will be made to reflect Mr. Cherry's and Mr. Sawicki's views.*

MS. ARON: Are there any instances that you know about for citizen participation at the state and local level, perhaps within the state of Connecticut, that you might tell us about that might have worked in your view sucessfully or unsuccessfully and if so, why?

MR. SUNDQUIST: Before we get to that question, let's respond to Mr. Stetson's question.

MR. BROOKS: I would like to respond because I was asked specifically about the connection between the streamlining of the adjudicatory process and the funding link and how you might go about that. There was some discussion of ways in which that streamlining might take place. I think there was some view that potential Federal legislation, for example, could eliminate the potential duplication of hearings. It was pointed out to us by the people in the Seabrook case that it is conceivable that they could go through another hearing exactly the same or longer than the one they just finished, complete evidence, the whole works again, under the current rules and regulations of the NRC. Legislation, for example could eliminate that. I think the Kennedy Bill did purport to try to do that. There are other things in the Kennedy Bill, I believe, as Mike said, milestones; after certain documents are done, within so many days the hearing must be held. You can procedurally use some of those mechanisms to shorten the process. There has been a fair amount of discussion on some of those options. We didn't get into it to make any specific recommendations but the general feeling of the group was you could tackle parts of it.

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*Editor's note: A revised version of the case studies acceptable to both Mr. Sawicki and Mr. Cherry will be issued early in 1977.

I mentioned the reservation, I think, about the summary disposition; although Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment, the appellate courts have pretty well weakened that to the point where it really doesn't work as it is intended to under the Federal Rules. Therefore anything that the NRC might do within their rules could be watered down in much the same way, so we recognized there were some problems with that.

I think the group was unable to state what the tradeoffs were, what the quid pro quo on one side was for the other side. We were just unable to wrestle with that, but the general agreement was that there was at least an arena in there, in those two issues, under which progress could be made by appropriate parties. I suspect that by "appropriate parties" we mean probably through the legislative process as opposed to any other single arena.

MR. LIEBERMAN: We didn't address that specifically in our group, but I would make the casual observation that funding and early entry into the process might expedite the process.

MR. PAGLIN: Directing comments to the desires for streamlining, I think some note should be made of the fact that the procedural tools are presently available for streamlining the process. That is to say that most of the regulatory agencies that engage in adjudicatory hearings have in their present rules of practice and procedure various techniques that have long been recognized in the courts and long been recognized at the administrative agency level for streamlining procedures, particularly when you have a number of adversary parties.

I have reference to the tools in the pre-hearing conference techniques, such things as consolidation, advance preparation of testimony, lists of witnesses, advance exchange of written testimony, outlines of cross examination, compulsory consolidation of presentations, limitations on time of presentations and limits on cross-examination. There are any number of procedural techniques available which, with a strong presiding officer who is willing to use these tools, can hasten or at least reduce the length of hearings. It has been done; there ought to be some perhaps independent group which might try to revise and enhance the use of these procedural techniques which would serve to save a lot of time and effort.

MR. BROOKS: That was recognized in our group; and it was also pointed out that funding could probably be accomplished under existing regulations of almost every agency as well. I think the feeling I was trying to put across was that a lot of people feel that this particular quid pro quo or balancing of it might have to come from an external source because it doesn't appear to be happening within some of the agencies, particularly NRC. I was trying to reflect the feeling of the group on that particular issue.

MR. SMILEY: Sy Smiley from NRC. Ras came around to our group and indicated, and I agree, that an important part of the workshop was to identify issues for further study.

In listening to all of the presentations, what occurred to me--at least I didn't hear this discussed--was that it seems to me that pubic participation has to be bounded. I am certainly not implying that participation is not an extremely important area. I am personally very much in favor of participation to the fullest and from the beginning. I thought that all the things that were said were right. But I think we have to let the public know, too, what the cost of this public participation is, not so much in the terms of dollars that might be laid out for groups to use to hire expertise--I think that is the easiest one to figure--but in terms of other costs. There is the cost, for example, of the extra work load on the Federal agencies and their contractors, like the national labs, in making this expertise available. I am only suggesting that this cost should be bounded because it is a very important part of a budgeting process. If an agency is supposed to do its work, I think somehow the whole process ought to be costed out.

Now, if a job is done, you have to look at the benefits, too, and it seems to me that a real case might be made for time savings from a more structured process in a lot of ways that were suggested in identifying the issues. But if somebody wants to look at this total problem of public participation, an important input, it seems to me, would be to bound the problem in terms of what the costs will be and look at all of the costs, not just the ones that are obvious, like the dollars that you might give to somebody for lawyers or chemical engineers.

MS. BRINCH: When the Environmental Protection Agency was charged with implementing PL 92-500, the Federal Water Pollution Control Act Amendments, which at that time had the most far-reaching requirements for public participation, they meant in all good faith to carry out all of that public participation. Regulations were drawn up with the help of public interest groups and every state was informed that they would not be receiving any money unless they complied with the public participation requirements under the law.

Unfortunately, as the law began to be implemented, the public participation requirements did not fall into disfavor so much as they became less important than getting the water permits out or getting the constructing grants out, getting the money out, and so forth. It wasn't that people necessarily were not committed to the prospect or the application, but it just took on a less important face, I guess, than the more important things that the agency saw for itself. I am not placing blame or anything. What I am saying comes from a lot of frustration in getting the agency to implement properly its public participation requirements. What I am trying to say is that you have got to have money and structure, and the agency has to make the commitment and commit its own resources and personnel. That is really what this thing stemmed from; they just weren't able to implement it with the people they had available. They might have had one public participation person in each region and maybe in each state, and that one person could not hold all the hearings and put out all the regulations and call all the people sufficiently. That happens, I guess, in a lot of agencies.

MS. ARON: I don't know how Commissioner Brooks feels about it, but I just wondered whether he might share with us his experience as Commissioner of Energy Policy for the State of Connecticut with respect to public participation and any efforts that have been underway there.

MR. BROOKS: To do it very quickly, I would like to pick out a couple of models that are in operation because I think they have some direct applicability. It is a little too early to say whether or not they are going to be tremendously successful although there have been some successes already in both of them.

First is an office called the Citizen Government Transportation Center. It is funded through some Federal dollars, some state dollars and some local dollars. It staffs a small office for a citizen representative on a transporation land-use policy board primarily, with a second objective of reaching out in the community to bring as many different people as it can into the transporation planning process. It has been quite successful. It has also taken upon itself the job of identifying and isolating the pressure points within the decision making process on transportation decisions, so that it knows where it can interact, what it has to do and the timing of what it has to do. Frankly, I myself find out more through this organization about what is happening in my state in terms of decision making than I can find out through my normal state channels. I think this organization has been operating for a couple of years and is a success in terms of bringing a lot of different people into the process in a meaningful way during the formulation of policy on the transportation issue.

The second one that I will mention is a slightly different version. It is one that I have had more of a hand in structuring. It is Title 20, which is the Social Services Act. It is a local delivery kind of system. Under the new Title 20 provisions, you have to set up a statewide planning process, and I was called in by the Commissioner of Social Service to help him set up a statewide planning process. We have set up essentially a statewide board which is comprised of people appointed by the Commissioner from a bunch of recommendations submitted to him. Five of the members are representatives of regional groups, the regional groups comprising 30 or 35 or so local people who are involved in this particular area. So we have a fairly broad representative kind of group.

Now, the really interesting and innovative aspect of this model, I think, is that the small regional groups are actually doing the needs assessment. They are the ones that are beginning the guts of the whole process based upon which the plan is going to emerge. It is going to be their work. No one is looking over their shoulder and no one is second-guesssing them. We are providing some staff to help them, but it is coming out of those areas and they are actually doing the work. It is the first model that I have seen along these lines in which the public, this aspect of the public at least, is actually doing the work upon which the plan is going to rest. I have told them that I think this is a unique opportunity that they are facing, and how they do may very well determine the expansion of this into many other areas.

I think those two are examples in different places of putting public participation into the process, and both are models that so far seem to be working and hold great promise.

MR. KADAK: My name is Andy Kadak. I was working on the Seabrook study group. Thre are a couple of things that I think we have ignored in this whole exchange. One is the role in energy decision making of the democratic process, namely, our elected officials and how we interact with them. Perhaps they have the most significant, let's just say, broad policy impact on where we go, whether we go to nuclear, coal, oil, or whatever.

That is one area which I think we ought to not reconvene a conference like this on, but which I think should have played more of a role in the discussions than has. We have been very narrow here with NRC licensing proceedings, which talk generally about a particular power plant and how successful or unsuccessful you were in stopping it, or slowing it down, or building it, or whatever. I think that is one avenue of public participation that we really truly ignored, and that really exists.

The second point that I would like to make is, what are the realistic opportunities for change. We had mentioned that there are avenues within the current NRC regulations that say, yes, we can have expedited hearings; we can have good, honest, let's even say fair (whatever that means) hearings. But is it going to happen? What does it all mean relative to what we are doing here? This question of funding and streamlining relates to the realistic opportunities for change; we are presently in a stalemate. The funding question is being held up by people such as utilities and industry types, because they feel it will hurt them; and the streamlining aspect is being held up by the antinuclear types who feel it will hurt them, so there is a stalemate. When will that break, and how will it break?

A final comment relates, although I hate to bring it up, to Mr. Cherry's sort of blackmailish actions. Now, if you want an industry to realistically say that it is in its best interest to come in and get public input, but then it is exposed to this kind of action--it is hard for me to go to my utility president and say I think this is a good idea and then he reads about a threatened blackmail--this is not the way things ought to be done. The utility president will then ask how am I going to avoid this kind of situation. Should we get further into public participation and involvement when the possibility still exists for this kind of thing? It is a very difficult thing to sell. I think it is a thing that has to be sold, but it is going to be very hard to sell.

MR. SUNDQUIST: There is no way of avoiding attempted blackmail in any set of circumstances. It doesn't always come from one side in these arguments. It can come from anywhere.

I might respond to your first point, which was a good one. We did not include in the definition of the scope of this conference the participation of the public in the electoral process or the legislative process because it seemed to us in those fields the right of the public to participate and the means by which it does so are firmly established, and there are really no problems.

You can have another conference on that subject, but where the problems lie that are frustrating everyone is in the relation of the public to the administrative agencies after the laws are passed. So to narrow the focus of the conference and make it somewhat more manageable, we defined it that way.

MR. BROOKS: Before we go on, I am not sure you can separate those that neatly in the sense that there is a strong tie-in, hopefully, between adimistrative action and policy development and ultimate regulatory action. Hopefully, they are coordinated. You can only get the one through the other, and vice versa. If they are not coordinating, you are in a lot of trouble. I just say you can't ignore either one of them. I have felt very strongly, as we have focused on the adjudicatory process, that we have, in fact, ignored some of the other questions about which process makes the most sense for decision making in certain areas. I tend to agree that we have ignored that in this conference and I think it is a shortcoming.

MS. BRINCH: It was because we were dealing with cases that were at the adjudicatory stage, it seems to me.

MR. SUNDQUIST: The point was made in one group last night that the challengers are really challenging the agencies' obedience to the law and that they should properly, in that instance, have taken their complaint to the legislature. The response was made that the legislature is unresponsive, so we have the fight the battle where it can be fought. The point Lynn makes is quite right; they are quite interrelated.

MR. FERRAR: There was an intervening discussion and I hate to bring us back to the subject that was obviously very uncomfortable, dealing with the editorial changes. I would like to keep it very short, but could you clarify what is going to happen now? As an author of one of those case studies, I am concerned there is going to be a shotgunning of counter arguments, and we will end up with a debate as opposed to just case studies, which were intended by the authors, of course, to just be seed for thought, to stimulate discussion and to give us some place to start this conference? Are we going to now have a variety of footnotes so forth, and so on? This is just for clarification, and let's please then get off the subject.

MR. SUNDQUIST: We are making policy on the spot, and perhaps we should think it over carefully and consider it later.

MR. FERRAR: My suggestion would be that if there were an awkward occurrence, that we not institutionalize that mistake and expand it.

MR. GRAVES: Glen Graves, National Science Foundation. I would like to comment really off the cuff on that point, but not off the record. I think that if we start adding amendments and editorializing afterwards, it is a rather curious and perhaps unwise precedent. I don't mean that MITRE might not be willing to entertain a series of letters or comments. I think we would want to take that up with them and see how it would affect the costs and changes in the proceedings.

If, on the other hand, there was a commitment to Mr. Cherry to allow his views and suggestions to be published in some way in order to assure his presence at the meeting, then I think that we will also try to assure that his views are properly presented and honor that commitment.

MR. YOUNG: I'm Frank Young, with the Nuclear Regulatory Commission, and I would like to address a question of fact to Walter Hahn. You said there was considerable discussion in your group of five innovative steps in a program. I didn't get number three. Could you note that, please?

MR. HAHN: The first was a need for a new adjudicatory agency, the second was access to an independent, separate information base, the third was early notification of the initiation of the process, and the others were early access to the information and financing.

MR. OLSEN: I want to put this in the way of a suggestion rather than a criticism, but we did, in our group, spend some time talking and there was a fair amount of feeling about the fact that all six of the cases dealt with facilities in one way or another. I realize there were reasons for this in that you wanted to have real case studies that we could deal with and so on, but I am concerned that behind these questions of facilities there are some much broader and much more basic and much more important issues related to energy in which certainly citizens should be involved, I think, if they are going to be involved anywhere; and these broader policy questions have not been addressed here at this workshop. In particular, I suppose I have in mind two fundamental questions. First of all, what levels of energy production and use are we going to have in the future and second, what means are we going to use for producing these chosen levels of energy? I think these two policy questions lie behind any particular facility questions. So my suggestion is that if we have a time in the future for another such workshop, I would very much like to see it grapple with some of these more basic policy questions and how citizens might contribute to forming some kind of policy in these very fundamental areas.

MR. SUNDQUIST: I think that is an excellent point, and reflects perhaps one of the ways in which some of our perceptions have been broadened. Most of the controveries have surrounded facilities, but public participation in the budgeting process and the government's long range planning process and so forth, is certainly of importance.

The selection of cases was governed to some degree by the fact that we had very little money with which to produce them, so we had to piggyback on case studies that were already underway for one reason or another, and those turned out to be mostly nuclear although the Pennsylvania case is both nuclear and fossil. We would have liked a greater variety. If we could have picked six cases on our own with enough money to hire somebody to do it in each case, we would have gotten much greater diversity.

MR. BROOKS: I don't think a week goes by that I don't get a dozen invitations to seminars and workshops on some of those kinds of issues. Frankly, if this workshop had been focused around those issues, I would not have come because someone pointed out today that we always have a habit of starting over in some of these workshops. I have been to so many of them now where we go around and around and everybody talks about the theoretical national energy policy and they talk about making these decisions on growth and they talk about all these things, but the fact of the matter is, no one is doing a thing about them. But those of us that are in government, and on the state level particularly, are faced every day with siting decisions that are still going to come along. There is no way that you can tell that applicant, stop, I can't do this until I have a national energy policy in my hip pocket. You are forced to guess and to make the best decision you can make at the time based upon tremendously sketchy information.

One of the grave concerns I have is that while we are sort of fussing around, trying to get Congress and other legislative bodies to enact policy, we are extending the time period that we have to make decisions and we are extending them to the point that the confidence level in our decisions is beginning to go down rapidly. I am very concerned that if we continue to extend it any further we are going to make decisions that have a very low level of confidence. This is a real problem that we are facing that we have to come to grips with. You can squeeze it from both ends. I'm not telling you what the solution to that is; I'm just saying that I'm getting very uncomfortable with it and it's affecting our cases and the kind of cases we have before us, so I'm very happy to come and focus on these specific cases. I will say that I'm taking this book back and I'm making that entire case study required reading for all of my senior staff because I think it's extremely important that they read what is in there as to what is happening in this particular aspect of it. That is my view, which I think is different from the last speaker's.

MR. DIGNAN: I would like to say one thing about the conference as a whole. That is that I have been very shaken by it, in a way that maybe some of you were surprised to hear me say. When I walk into these hearing rooms, I frankly don't expect the opposition to trust the utility. I assume they are there because they oppose us. I have been very upset to detect what I believe is obviously deeply held, even though I may not agree with it, convictions by the citizens' groups that they don't trust those agencies and they don't trust their government. It's been a very shaking experience for me. How much of this is an outflow of Watergate--but I'm not sure it's all Watergate because I think this distrust, as I have heard it described, developed long before

Watergate. And I think if anything else, and not just the government people who are here, but myself, just as another citizen, something has got to be done--I don't have the answer--to get some of the trust back of the agency, at least.

The utility is there with what everybody concedes is a private interest. I understand the view that my witnesses are not to be trusted. To put it bluntly, I can understand my opposition saying, well, they are paid a heavy expert fee and they wouldn't be testifying if they weren't going to come out the way the utility wanted them to because they are going to go find another expert who saw it their way. But I am very disturbed and have been quite shaken to hear very deep-felt convictions from a number of people, and people, whether they know it or not, I have come to respect at this conference, who really just don't trust the United States Government and don't trust the state government. I think that is something we have accomplished here, if nothing else. We have got that out on the table. It was, at least to me, quite shaking.

MS. SINCLAIR: I wanted to add something that was passed over very quickly in our group, but I thought was a very important point to make. That is, I think a lot more information should be fed to our state agencies so that they can be more responsive because they are closer to us. We have found that we have had to supply almost all the information that concerned us to the agencies and they they would not respond because they didn't feel they had the technical expertise or they were not adequately informed from the Federal government as to where to look or whom to consult or how to become responsive on the state level. I think that would begin to improve our confidence, that our agencies really knew what they were doing locally, you know, closer to us. We would like to deal with those people that are closer to us.

The other point, as far as budgeting the costs of public participation, I think they should be weighed against what the man from Philadelphia Electric pointed out was such an extremely high cost they ran into by not getting public participation early. I know in the cases that I have been involved in or observed, the costs have been enormous and we would certainly have preferred not to have had the stress or the difficulties ourselves that we had in funding; and we would have preferred not to have increased the costs, if we had had ample opportunity early enough to have a much more relaxed and a better way to proceed than the only one that was open to us. So there is a cost involved in not including the public that should be weighed against whatever costs come in by including the public early and in a more meaningful way.

MR. FERRAR. Bill Harral, who is Executive Director of the Governor's Energy Council, said I could feel free to speak on his behalf here today and I think he would share the thought I am about to give. A lot of the distrust with the citizens in Pennsylvania that was directed toward the Governor's Energy Council during the energy park experience emanated from exactly the point that was being made there, that the Governor's Energy Council was unable to answer their questions because they were unable to do the appropriate amount of investigation due to financial shortages; and the result was that people felt that information was being withheld. Also, in a lot of cases the Governor's Energy Council had to refer the citizens to the utilities themselves to try to get these answers and that gave the impression, the obvious impression I suppose, that the utilities were in cahoots with the Governor's Energy Council because they were constantly communicating with one another, mostly technical information flowing to the Governor's Energy Council, leading the citizens to see this kind of interrelationship.

An observation also following along some of the comments Tom made a moment ago is that there does appear to be a sincere breakdown in our regulatory system because indeed, regulatory systems were designed to represent the people, to protect the public interest, and what we are seeing here is a resort back to the judicial adversarial kind of system, which is sort of more fundamental, I guess, in the way of a social order.

CONCLUDING REMARKS

JAMES L. SUNDQUIST

In conclusion, maybe I can take my cue from Tom Dignan. If someone who has been immersed as long and deeply as he has in the subject has found the conference to be a mind-broadening experience, where he has become more aware of other people's views to the extent he has indicated, then I'm sure that goes for every other one of us as well.

While we haven't solved any problems, or resolved anything, or taken any stands, it seems to me that we have accomplished several things in these two days. We have brought together more factual information than has appeared in any one place before about how this process of public participation is actually working, in the case studies and in those brilliant presentations yesterday where the non-lawyers performed as eloquently as the lawyers in many instances. We have overcome the frustration that many of us have felt in not really knowing what is happening in this field.

One can't leave here without being impressed with the acceptance of the whole idea of public participation, and that is important in itself. It's a new concept really, only a few years old, the idea that public participation should take place in every kind of decision. If anyone came here with the wistful notion that we can turn the clock back, that we can step even a little way back toward the good

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old days when the public was inert, or could be excluded, I'm sure that impression has been corrected. That is an important threshold to cross, because if the idea of public participation as a principle is accepted, then we can begin grappling with the question of how do we make it work--how do we do it, and how do we do it in such a way that the loss of public confidence in the process will be restored.

I believe that we have identified, or sharpened the identification of, a good many of the problems that stand in the way of that. If we haven't answered them, I believe we have at least clarified the directions that need to be taken toward their solution and pointed up areas for concentrated effort--areas for research and discussion and legislative action. We have put a lot of facts, ideas, and proposals into the public domain, and we may hope that the proceedings of this workshop will contribute to the initiation and to the substance of further discussion.

APPENDICES

APPENDIX A

PERSONS ATTENDING
WORKSHOP ON
PUBLIC PARTICIPATION IN ENERGY RELATED DECISION MAKING
SEPTEMBER 21 AND 22, 1976

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APPENDIX B

PUBLIC PARTICIPATION IN ENERGY RELATED DECISION MAKING
(with emphasis on nuclear regulatory processes)

A Report of a Panel of
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This report presents the views of a panel convened by the National Academy of Public Administration for the primary purpose of guiding the development and conduct of a two-day workshop on public participation in the making of energy related decisions. The workshop, one of a series sponsored by the National Science Foundation and organized by the MITRE Corporation, was held in McLean, Virginia, September 21 and 22, 1976. It brought together nearly 100 people from all parts of the country, representing industry, environmental groups and othr citizen organizations, Federal, state and local officials, academicians and policy analysts.

The discussion centered on the examination of six case studies of specific energy related decisions prepared for the workshop. Five of the studies concerned the siting of facilities, mainly nuclear power plants, and one covered formulation of a safety regulation by the Nuclear Regulatory Commission. The focus on nuclear questions was dictated by the fact that the decision making process seems to be put to the severest test in this particular policy arena where public participation is most spirited, intense and organized.

The report represents a concensus of the panelists, but this does not imply that each panelist fully concurs with every position taken. The panelists engaged in this endeavor in their individual capacities, and the views expressed below do not necessarily represent the positions of the organizations with which they are affiliated. While the workshop and the six case studies provided the main body of data from which the panel has drawn its findings, each panelist brought to the effort the perspectives of his own background and experience.

This paper is being circulated both as part of the proceedings of the workshop and separately in order to stimulate further discussion of the important public policy and public administration questions that were the focus of the workshop.

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PUBLIC PARTICIPATION IN ENERGY RELATED DECISION MAKING

Disenchantment with processes for reaching energy related decisions--and for public participation in those processes--is widespread, even well-nigh universal. Not only is there much discontent with the public policy that finally emerges, but the process itself is criticized on many different scores. However the chimera called "the public interest" may be defined, few would contend that it is being well served by the processes through which energy policies and programs are formulated and executed today. The findings and conclusions that follow are an attempt to suggest directions for those who seek to improve these processes.

1. Public participation has been a fundamental concept of democratic government since the beginning, but in recent years the idea has taken new forms and gained new force. These changes are not, nor should they be, transitory. Governmental processes at all levels must adapt to them so as to meet the demand for participation without unduly delaying decisions and impairing the whole decision making process.

Strict constitutional constructionists may argue that the right of citizens to participate in public policy decision making does not extend beyond the vote. Indeed, the constitution is silent on this score. But custom and practice have established as an unwritten constitutional principle that citizens have the right to be informed and to be heard not only by legislative committees but by the officials who formulate administrative policy and carry it out through executive action.

Within the past ten years or so, the administrative decision making process has been opened up in innumerable ways to permit greater participation. While polls and surveys show a steady and continuing decline in citizen trust in governmental institutions, there has been a rapid proliferation of citizen groups dedicated to a wide range of causes and concerns--consumer rights, minority rights, women's rights, environment, and energy, to mention some of the areas of greatest activity. If large segments of the public have become disillusioned by the apparent unresponsiveness of governmental institutions, there is still a conviction among citizen groups that they can influence the policy process through various participatory mechanisms.

The claim of some "public interest groups" to represent the public interest is frequently challenged. Large elements of the general public do not take part in or associate with the public interest group movement. Those who question the value of public participation contend that our elected system of government provides for representation of the public will, and there is no need for an outside channel. It is argued that the more militant groups place severe pressures on the system to the point of abusing it. These groups, the argument runs, believe in the process of public participation only when the final decision accords with their position.

But a role for public participation has been widely accepted. The momentum gained in recent years by the multitude of "public interest groups" and "citizen intervenors" who involve themselves in energy related decision making does not appear to be a temporary phenomenon. Many groups have developed standing and substantial followings in their communities. There are also many smaller groups of professional advocates without membership organizations but with their own version of commitment to "the public interest." Taken all together, the movement of public interest groups has made significant contributions to the stimulation of citizen awareness and to a restoration of a belief that an individual can have a direct influence in reaching the decisions that will affect his way of life.

These decisions involve complex questions of equity in asking one community to take on the burden of using its land, air, and water to provide power for distant communities which may be spared such sacrifices. The question may cross state lines: under what circumstances should one state agree to sacrifice its rural environment to serve the power needs of a load center in another state? A common problem in siting almost any energy facility is that no one wants one in his backyard. If every community can succeed in rejecting energy facilities, no new plants will be built. Yet that would be unacceptable--except for some elements of the anti-growth school who might welcome a curb on any new energy development.

The increase in public participation inevitably complicates the processes of policy development and public administration. Indeed, the complexities of the American system with its checks and balances among the three branches of government and the multi-layered jurisdictions of power already dictate a considerable amount of overlap, inefficiency and delay. If adding citizen participation to the system further complicates the process, as the necessary price of democracy, then even more attention needs to be paid to finding ways to simplify and rationalize those processes. Only through institutional reform and adaptation can there be a reconciling of the demand for effective participation with the need for a reasonable degree of expedition in making decisions.

2. Citizen intervention has been particularly significant and useful in illuminating the nuclear debate.

The nuclear controversy has deeply divided the American public, whether one speaks of the nation as a whole or of communities where nuclear power plants and supporting facilities are proposed to be sited. A major cause of dissatisfaction with the existing decision making process relating to commercial use of nuclear energy--and of the confusion, delay and rancor that characterize it--is the fact that opposition at the level of siting decisions (state and local) is viewed by intervenors as the only way of fighting against a Federal energy policy with which they passionately disagree. It appears that citizen opposition to nuclear power plants at state and local levels will continue until that unforeseeable point when either the proponents of nuclear power persuade the opponents to accept its promise or the oponents succeed in reversing the present national policy. In view of the low probability of either contingency, the future seems likely to hold only the unhappy prospect of continous controversy. It is not beyond possibility that the dispute could become so divisive as to create severe strains upon the social fabric.

A major impediment to the rational and orderly working of the present decision making process is the lack of trust that has already grown up among the three elements in the process--industry, the citizen intervenor groups and the governmental institutions. Though individuals of earnest conviction and good faith are involved on all sides of this triangle of relations, trust has been eroded by suspicion and loss of credibility. The Nuclear Regulatory Commission and its predecessor agency are frequently singled out as failing to merit trust because of an alleged bias favoring industry and against intervenors. Delays by NRC in resolving the question of providing financial assistance to intervenors are cited as a case in point. (See page 379)

Some elements of the energy industry, in their turn, believe that citizen intervention is leading to higher energy costs and to stalemate in developing energy supply capability. The intervenors, of course, shift the blame for delay to the cumbersome decision making process and those who govern its operation. Government officials are divided; some question the representativeness of the self-styled public interest groups and consider themselves as better equipped to represent the public interest, while others welcome citizen intervention as the means of balancing pressures from industry.

Whether one views the stimulation of public involvement in the nuclear debate as an abomination or an unmixed blessing may depend on where one stands on the nuclear controversy. There can be no doubt, however, that numerous risks associated with nuclear power in general and with specific sites in particular have been exposed through, and probably because of, such intervention. The growing awareness of the general public of the uncertainties of relying on this source of energy can be attributed in large part to the efforts of intervenor organizations.

Still another aspect of the nuclear controversy is a growing Federal-state contest reflected in an increase in state challenges to the Federal preemption of authority in regulating nuclear power in the areas of public health and safety. The question posed by some elements at the state level is why the Federal Government should have authority to regulate an activity that affects most immediately and directly the citizens of a particular state and local jurisdiction. At the same time there is a wide recognition among state officials responsible for energy policy that the Federal Goverment must exercise a leadership role in searching out the answers to problems which transcend state boundaries. Meanwhile, another jurisdictional contest is being waged by local governments seeking to prevent either state or Federal preemption of energy decisions crucial to local community interests.

3. Decision making would be expedited if public participation could begin at an early stage, before industry plans are fully developed. Adoption of this objective may be dependent on enactment of state legislation authorizing control over siting decisions, as well as legislation to control or prevent speculation in land values.

The inaccessibility of data on the plans of utilities for energy development is one of the most deeply felt complaints of citizen intervenor groups. They contend that, often, planning is carried forward in secret by the utilities, or in what some citizens perceive as a kind of conspiratorial utility - regulatory agency relationship, and then sprung on the public for eleventh-hour approval. At that point, the citizen groups face the problem of organizing, raising funds, engaging counsel, obtaining and analyzing information, and making their case--all while under the accusation of being responsible for delay.

The utility spokesmen counter that, if plans are presented to the public while still general and tentative, the utilities find themselves on the defensive before they are fully prepared, and are accused of being evasive and concealing their intent. As in the

Pennsylvania case considered by the workshop, they may stir up needless opposition from residents in areas that ultimately would not be chosen. Finally, if site selection plans are revealed before options are obtained, speculative increases in land prices follow. Consequently, the early release of information may be desirable only if states act to control speculation through the public acquisition of sites or some other effective means. If that is accomplished, the case for bringing the public interest groups into the decision making process seems uncontestable.

While citizen groups often feel quite competent to inform themselves if they are given access to information, there is still need for more systematic methods of informing or educating the public on energy matters. Nuclear energy issues in particular are so complex, technical and awesome as to turn off many elements of the public. Yet, many energy questions are too important to be left to the experts. Moreover, there is widespread distrust of the nuclear promotion literature of governmental institutions.

Objective and balanced public information programs are a major responsibility of both the governmental institutions promoting and regulating energy development and of the private firms that are constructing and operating energy facilities. This responsibility is not discharged merely by disseminating press releases to the media or by placing announcements of pending actions in the Federal Register. Citizen activists are looking for more hard information disseminated well in advance of decisions to permit full public examination of the merits of proposed energy developments. Specific proposals for meeting information needs that surfaced in the workshop are advanced in item 8 below.

4. To facilitate public participation, procedures for providing financial aid to intervenors should be introduced on an experimental basis by Federal agencies in the energy field.

A number of agencies, including the Federal Trade Commission and the Consumer Product Safety Commission, have claimed some degree of success in the funding of intervenors. Although legislation to provide this authority to a broad range of regulatory agencies did not come to a vote in the 94th Congress (1975/76), it is expected to have a more favorable prospect in the 95th. Meanwhile, the Comptroller General has ruled that Federal agencies required to hold hearings for the issuance of authorizations, which hearings must permit presentation of opposing viewpoints, have inherent authority in their discretion to provide financial assistance for such presentations. The ruling, nevertheless, urged Congress to adopt legislation which would appropriate funds specifically for financial assistance to intervenors.

In November, the Nuclear Regulatory Commission issued a decision based on an informal rulemaking proceeding to the effect that it would not provide funding for participants in its licensing, enforcement and antitrust proceedings and, as a general proposition, in its rulemaking proceedings. These determinations were attributed to both policy considerations and the limited extent of the Commission's present authority to extend financial assistance under the Comptroller General's ruling. The Commission made a single exception, however, in authorizing assistance in connection with the mixed oxide fuel "GESMO" proceedings.

Without a means of covering the costs of legal and technical advisory fees, the intervenor groups are clearly at a disadvantage in competing against the utility firms. The latter can pass on the costs of litigation to rate payers. They also have other advantages in the size of their legal staffs, accessibility of technical information, and the background of years of experience in administrative and legal proceedings. Measures are needed to provide citizen groups the means to make use of the legal proceses which have been established for the purpose of intervention.

On the opposite side, it is argued that a universal program to provide financial assistance to intervenor groups would have a number of adverse effects. Plaintiffs with special concerns might scramble to qualify for funding to the detriment of more representative groups. Setting and applying standards to qualify intervenors may be difficult, but the Federal Trade Commission has already established guidelines for qualification and disbursement of funds.

Industry representatives tend to be against financial aid for intervenors while intervenors tend to be for it, but there is no unanimity in either group. Nor is there within this panel. But most of the panel favors at least a variety of experimentation, with each agency using its present authority to fund intervenors as the circumstances warrant. The panel supports the "citizens suits" provisions of both the Clean Air Act and the Federal Water Pollution Control Act, under which a court may award costs of litigation when deemed appropriate. The financial position of intervenor groups has been strengthened by permitting tax deduction for contributions to organizations bringing litigation under these statutes.

5. Federal agencies in the energy field should explore and adopt innovative measures--both institutional and procedural--to improve the process of public participation, while awaiting resolution of the question of funding of citizen group intervenors.

Agencies should be encouraged to experiment with novel procedural approaches in handling the resolution of scientific and technical issues in energy cases, while assuring the opportunity for meaningful and effective presentation of citizen and consumer viewpoints. There is considerable opinion that the traditional trial-type evidentiary hearing is ill suited for the determination of complex questions of technological and economic impact. Other formats and processes which are employed in the formulation of regulatory policy might be adopted in resolving safety and environmental questions which are posed in connection with proposed construction of power plants. For example, such questions might usefully be submitted by the parties to a panel of experts for discussion and recommended resolutions prior to the formal hearing required by statute. Such an advisory group would be composed not only of recognized authorities in the various scientific disciplines involved, but would also have representation of the different viewpoints of industry and public groups. The panel would be free to use a variety of informal procedures, written and oral, which would insure a full and complete exploration of the issues on a technical level, the conclusions of which would then be submitted for consideration in the formal record of the proceeding.

In many other situtations, where so-called "generic" issues of safety, health, or environmental impact arise on a recurrent basis in case after case, the agencies should employ the recognized procedures of rulemaking and legislative-type fact finding hearings, with written presentations and oral arguments, of the resolution of such policy questions, rather than the trial-type techniques of adjudicatory hearings. Where it is necessary to explore the validity of certain assumptions or technical data presented in such proceedings, separate inquiries can be held when the need is demonstrated. In other instances, informal conferences among the agency staff, the indusry applicant and public intervenors prior to and during the formal proceedings can be used to resolve many technical and procedural matters in a far more expeditious and effective manner than the "on-the-record" confrontations.

In the hearing process itself, there are a number of recognized techniques which can and should be employed to improve efficiency, expedition and fairness. These have already been instituted by some regulatory agencies and can be adapted for the energy field. They include early notice of application filing and informal consultation with potential intervenors, expanded use of pre-hearing techniques to crystallize critical issues requiring evidentiary hearing and eliminating by stipulation other issues, agreement on scope of testimony and cross-examination, firm schedules for discovery and hearing sessions, deadlines for submission of pleadings and issuances of decisions, and restriction of appeal process to demonstrated error.

Participation by citizen groups can be assisted, without direct financial support, in several ways: provision of hearings transcripts without cost where the intervenor cannot afford the expense, waiver of rules requiring the submission of multiple copies of documents and exhibits, access to agency documents and information without requiring the payment of usual fees for search and reproduction, etc. Each of these measures, some of which can otherwise be of considerable financial burden, should enable the public groups to make a more effective presentation in the proceeding.

Following the example of a number of the regulatory agencies in other fields, the energy agencies could also consider certain organizational innovations which would enhance the nature and scope of public participation. The energy agencies could establish, within their existing organizations, independent units which have elsewhere borne the title of Office of Consumer Advocate or Office of Public Counsel. Such offices in other agencies have separate staffs and budgets and are authorized to participate in agency proceedings as an independent party, in order to assure the effective presentation of consumer viewpoints which might not otherwise be adequately represented in such proceedings. Another form of organizational unit, though of a different magnitude, are the Consumer Assistance Offices which, separated from the operating bureaus, serve as a centralized source of information to all segments of the public who seek access to the agency's processes. Their offices can be quite instrumental in expanding the informational channels to the interested public groups by direct mailings to citizen organizations of agency public notices (without relying on Federal Register Notice), by preparation and widespread distribution of informational manuals as to agency organization and proceedings, by conducting regional panels with agency staff participation for public access and information on agency activities and policy, and by publishing and distributing to known citizen groups newsletters and "Action Alerts" informing the public of current developments, filings for proposed plant construction, and upcoming proceedings for policy formulation and regulatory action.

Each of these facilitative measures should serve to "open" the agency to the public to a greater extent than in the past and should serve to restore public confidence in the operation of the government and its agencies.

6. Site selection should be conceived as fundamentally a public rather than a private responsibility, to be accomplished through a planning rather than an adversary process. The states, individually or in regional groupings, should assume this public responsibility.

Whether or not the public is let in on the plans of the energy companies at an early stage, planning of facilities and selection of sites is still looked upon in most states and localities as a private responsibility. When citizens' groups become involved, although they identify themselves as representing the "public", they in fact represent only a segment of the public. So the question becomes a matter for contest between two essentially private groups, with the public bodies as arbiters. If a citizen group manages to block a particular plant location, the utility is sent back to select another site, and the adversary process begins all over again.

This approach is being gradually modified through action by some states to make site selection a matter, to some degree, of public initiative. Ideally, under this concept, a state planning body weighs all the demands being placed upon the state's land resources--for urban development, recreation, agriculture, scenic and wildlife preservation, transportation, and so on--and prepares a plan designed to best reconcile the competing demands. Within the plan, energy development is assigned the site or sites that will bring the most benefits with the least conflict with other needs and values. But only a few states are even beginning to approach this model. In Maine, which has a relatively advanced law, for example, the State Environmental Improvement Commission is authorized only to act negatively; it could tell the utility in the Sears Island case that it could not have that island, but it had no authority or responsibility to propose an alternative site.

The panel considers it anomalous that so important an ultimately public decision as site selection for an energy facility should be left in the first instance to the utility firms whose primary concern is energy supply; that the protection of alternate interests is left mostly to the initiative of other private groups; that specialized state agencies enter the controversy only as allies of the private groups on either side; and that the final decision is made through a judicial rather than a planning process, on the basis of legal briefs rather than optimum land use considerations. It is anomalous, in short, that the obtaining of necessary energy supplies with the least damage to conflicting objectives is not recognized as a public objective in the first instance, as a job for policy officials aided by planners, not for judges.

In the alternative--or planning--model, citizen groups as well as energy suppliers would participate in the planning process, and ultimate recourse to the courts for protection of legal rights would remain. Some spoksmen for utility groups indicate a willingness--if not eagerness--to shift to state governments some of the burden of planning and confrontation with citizen groups that they feel they are now carrying virtually alone. They justifiably complain that as they strive to achieve objectives that have the implicit, if not explicit, approval of Federal and state agencies, and hence are established as public objectives, they are accused of serving only their private interest.

One argument for shifting from an adversary to a planning process lies in the handling of complex technological decisions such as those involving energy. Not only court systems but administrative agencies as well retain the flavor of their ancient common law heritage. The formalities of these systems, their costs in terms of both time and money, their heavy reliance on precedent, and the unfamiliarity of judges with technical issues call into doubt the appropriateness of the systems for resolving issues posed by modern technology.

Individual cases often involve a complex interaction between state and Federal agencies and an elaborate movement through the appeals process of the courts. Much of the protracted delay in the decision making stems from overlapping authority and cumbersome procedures in both the administrative and the court systems.

Enormous investment in time and effort on the part of many contending parties goes into the process. What emerges as the product of these efforts often falls far short of a clear-cut policy. One study leads to another study. Hard choices are delayed. Compromise solutions satisfy neither side. Part of the problem stems from pressures on the system in the form of various efforts to manipulate it for the ends of the contending parties. As noted above, opponents of nuclear power are using stalling tactics applied at the point of siting and construction decisions to oppose a national policy with which they disagree.

Lawyers assume paramountcy in this environment. They tend to be trained more as adversaries than as arbiters. Laymen find great difficulty in understanding the workings of the legal mind and some of the more arcane aspects of the law. Legal complexities obfuscate basic issues. The outcome of cases is highly dependent upon the availability of experienced and competent counsel and technical advisors expert in the subject matter under dispute.

The complexity of the system and the high costs of legal counsel and technical advice discourage many public interest groups from active intervention. Intervention becomes a specialty of a relatively small corps of dedicated lawyers and environmentalists who serve as spokesmen for the causes they represent. The process fosters polarization rather than conciliation. It also fosters remoteness between the lay public and the decision makers. While public hearings provide an opportunity for laymen to become informed and involved, only a small part of the public participates. Acrimony and suspicion survive after decisions are reached.

The only process where large elements of the public take part in a decision relating to energy is in a state initiative or referendum such as the California initiative in June 1976 and those on the November ballot in other states. While many states with the initiative process have put the process to use on the nuclear issue, this is hardly a way to reach a coherent national energy policy.

7. The country needs an explicit and well articulated set of energy goals, that would balance demand forecasts--assuming maximum conservation measures--with supply. The goals would be broken down by region and by type of energy source.

To move public institutions in the direction of a coherent set of energy policies and programs is an ambitious and challenging task. The institutions are handicapped by organizational disarray that has prevented either the legislative or the executive branch of government from producing a set of consistent energy policies responsive to urgent needs. Perhaps the first step will have to be the clear fixing of responsibility for restating energy options and formulating energy goals in terms understandable and acceptable to most Americans.

National energy goals should be broadly conceived and subject to periodic revision. In developing these goals, citizen views on such controversial questions as the further develepent of nuclear power would be heard, and a decision made--which would be subject to review through normal political and legislative processes. But until reversed through that process, or through the process of periodic revision, they would stand under this ideal model--not subject to rehash and review, over and over in every individual siting controversy.

On the basis of the regional goals, regional or state bodies would determine the need for individual facilities, and state planning instrumentalities would designate areas appropriate for siting. In view of the fact, however, that no more than a few states have planning bodies competent for that task, federal legislation to foster and encourage comprehensive land use planning by the states would be an essential prerequisite for the approach advocated here.

8. To improve the process of public participation and increase its effectiveness as part of energy related decision making, the initiative begun with the workshop should be extended in a number of fields that make up collectively an agenda for future research. One need which is widely recognized and which should be addressed as an immediate follow-up of the workshop is the establishment of an information exchange mechanism or a clearinghouse to provide citizen groups and the general public with information on energy related questions and public participation techniques.

The September workshop, and other similar exercises, have pointed up many unmet needs. It has been clearly demonstrated that citizens who seek to influence the operation of the present highly pluralistic system of decision making in ways responsive to the various publics they represent are often frustrated by the unwieldiness of the system. As observed earlier, much of the contention and frustration in the public interest movement stems from a sense that the system is accessible only to the more narrowly-based groups usually representing industry. They can afford to acquire the professional skills to influence the system. Some more broadly based citizen groups, particularly national organizations, have developed the competence to operate effectively through the system. The smaller, newer, and more grass-roots oriented groups find the task far more difficult.

Seen from other perspectives, those of Federal, state and local governments and of the private companies all of which share responsibility for energy related decision making, there is an equally evident frustration with the cumbersome nature of the system of which they are all a part. These organizations also have a stake in improving the way the existing processes work. They are interested in promoting resolution of energy questions through energy policies and programs that will have public acceptance. In short, all parties concerned, public interest groups, government agencies, energy industry representatives, have a common interest in any mechanism that will help to produce more light than heat in energy related decision making.

The areas that should be explored in future research efforts include the following

a. identification of alternative participatory models
b. further case study work
c. synthesis and dissemination of information.

While there is not now, and most likely never will be, one standardized model of "The Participation Process," it seems reasonable to search for a limited set of generalized approaches that could be useful both as subjects of research and for application in decision making processes. The accumulation of experience of citizen participation at various levels and in various aspects of decison making should be examined to determine which techniques or which models work best under various circumstances. A catalog of "do's and don'ts" for participation would be helpful in orienting individuals or groups and as a base line against which to refer current and future experience. If, as recommended above, government agencies experiment with various models of participation, the record of such innovation should be incorporated on a continuing basis in this inventory.

The high level of interest in the six case studies prepared for the workshop points up the value of pursuing additional research along these lines. The recording of the experience gained in past cases is an effective way to draw out those lessons that can lead to improvements of the process. The six cases reviewed for the workshop tapped only a small fragment of the total universe of experience. Other types of energy related decisions should be subjected to similar analysis to provide a broader and more representative sample. More emphasis should be placed on analysis of the significant lessons emerging from the cases studied.

Finally, a major objective for follow-up activity emanating from the workshop should be a better machinery for synthesis and dissemination of information. A more manageable and accessible information base and a better system of communicating among the several sectors involved in the search for solutions to energy problems is needed. The workshop, like some similar efforts that preceded it, moved in the right direction. But greater continuity is needed in order to assure the building of a base of accumulated knowledge.

All of the information and communications requirements cited above might be met throught some kind of information exchange or clearinghouse mechanism. One of its functions would be to translate technical data and agency plans into terms comprehensible to lay citizens. It would also serve as a means for the transfer of information among the citizen groups themselves. This is not the kind of purpose that would be served simply by creation of another government agency. Unless the development of the clearinghouse itself were a participative endeavor, it would be suspect as the tool of government or industry or both.

A problem area for all concerned with the effectiveness of citizen participation is the definition of concepts and the terminology to designate them. Terms such as "public interest groups" mean different things to different people. A valuable service could be performed in demonstrating where there is a high degree of acceptance and where there are differences in usage.

The functions of an information exchange or clearinghouse would be the usual ones of collection, storage, retrieval and dissemination. But a research role might well be combined with the information function. The research would seek to advance an understanding of the participatory process itself through the collection of case studies, the analysis of the differences in rules and practices among administrative agencies, the examination of different techniques used by citizen groups, and ultimately the design of model participatory "systems."

The sponsors of the workshop and other public or private sector organizations having a stake in the concerns addressed in the workshop should look upon that event not as a book to be closed with the issuance of the conference proceedings but as a start towards building the information exchange capability necessary to make participatory democracy function.